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Supreme Court of the United States.

JAMES M. SIGAFUS,
Plaintiff in Error,

vs.

DUDLEY PORTER ET AL.,

Brief on Behalf of Plaintiff in Error.

EDMUND WETMORE,
HENRY R. JOHNSON,
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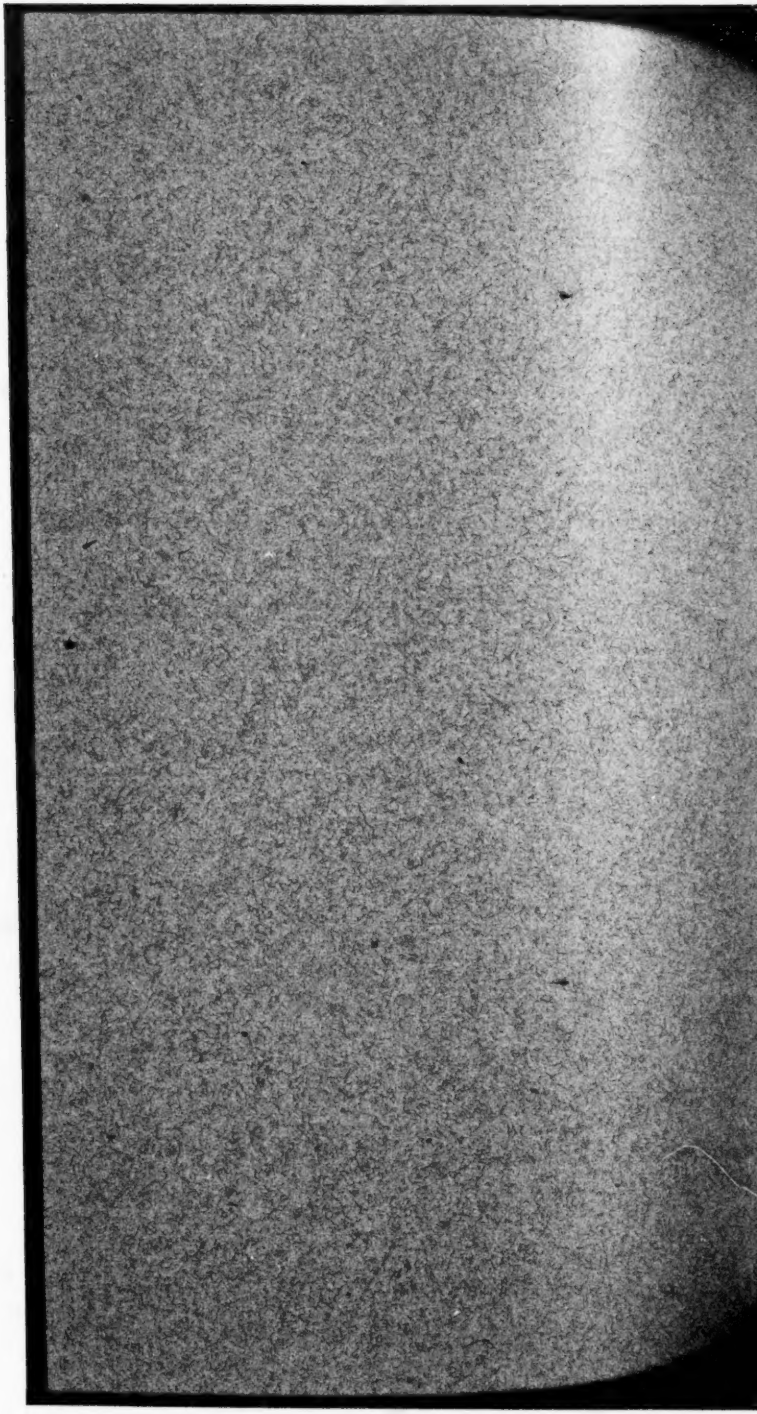
G. S. Sargeant, Printer and Bookbinder, N. Y.



SUPREME COURT OF THE UNITED STATES

JAMES M. SIGAFUS,
Plaintiff in Error,

vs.

DUDLEY PORTER ET AL.

Brief on Behalf of Plaintiff in Error.

This case first came before this Court upon a question of law, as to the proper rule of damages, certified by the Court of Appeals for the Second Circuit.

After argument upon this question, the entire record was directed to be brought up for review, and now comes before this Court pursuant to that direction.

A brief was filed on behalf of the plaintiff in error on the first hearing, which was, and only could be, directed to the question as stated in the certificate of the learned Court below; the present brief discusses that question in the light afforded by the record which is now before the Court and permits a fuller examination of the point involved than was possible from the certificate alone, and, also, as the whole case is now before the Court, discusses certain of the exceptions raised by the writ of error and overruled by the Court of Appeals, should this Court deem it proper to consider the additional questions thus raised.

Statement of the Issues and Evidence in this Case Which Determine the Proper Rule of Damages.

The action out of which the questions in controversy arose was brought by Dudley Porter and others against James M. Sigafus, the plaintiff in error, for fraud and deceit.

The complaint (fols. 12–26) sets forth that, at the times therein mentioned, Sigafus was the beneficial owner of a gold mine in Riverside County, California, the legal title to which was in the Good Hope Consolidated Mining Company, whereof Sigafus was president and owned all the stock with the exception of a few shares belonging to one Bird.

That the said Sigafus, representing his own interests and those of said company and of said Bird, through one William H. Griffith, entered into negotiations with the plaintiffs for the sale of said mining property, and, during the course of said negotiations, made certain false and fraudulent representations, and fraudulently placed among the ores to be reduced in a mill run made to test the value of the ore, quantities of exceptionally rich ore, and covered up excavations in the mine with timber so as to prevent the plaintiff's representative from investigating the condition of said mine, and fraudulently changed certain bullion returns as to past production, and misstated the quantities of ore producing said bullion, so as to show a larger and richer production of gold from ore mined than had, in fact, been made, all of which acts and representations were done with false and fraudulent intent, and that the plaintiff believing the representations and reports and mill run to be correct, bought the said mining property and paid $400,000 therefor, to their damage one million of dollars, the alleged difference between the actual value of the property and what, as is alleged, it would have been worth if the representations and reports and mill run had been true and correct.

All the charges contained in the complaint are denied by the answer (fols. 33–55).

This action, it will be noted, is not brought on a warranty; it is based purely upon fraud and deceit—not upon any statements or representations as to the condition of the mine *at the date of sale*, but upon alleged fraudulent concealments, exaggerated statements as to the past history of the mine, secret enrichments of a small lot of ore taken from the mine to be run through as a test, blocking up abandoned levels and the like, all calculated to deceive a purchaser and induce him to form a higher *opinion* of the value of the mine than he would have formed if he had known the truth, but none of them amounting to a representation of *any* fact, past or present, from which anything more than an *estimate*, and, from the nature of the case, an *uncertain* estimate, could be formed as to the actual value of the property.

This will appear still more clearly from a brief examination of the facts disclosed at the trial and the only evidence on which the charges of fraud were based.

Sigafus, the plaintiff in error, having, as the result of his dealings with the Good Hope Consolidated Gold Mining Company, become the virtual owner of the mine, desired to dispose of it. He originally intended to operate the mine under the agency of his son-in-law, J. Everett Bird, but the latter becoming incapacitated so that he was subsequently placed in an institution, and Mr. Sigafus being an old man, this plan was abandoned and the mine was known to be for sale (fols. 269, 881, 1547).

A number of persons, thereupon, came to examine the mine on behalf of possible purchasers or of those who expected to earn a commission by effecting a sale of the property (fols. 889, 890).

Among others, one Burnham, a mining expert, examined the mine in 1891 on behalf of Doran & Maxwell, who obtained a "bond" or option on the property. As the result of this and a subsequent examination made in February, 1892, Burnham made a report which he furnished Maxwell, and is known as the Maxwell or Burnham report. Burnham was not employed or paid by Sigafus (fols. 889, 890-1).

After a number of negotiations with various parties, including one William H. Griffith, Sigafus finally concluded a contract with said Griffith, by which Griffith agreed, subject to certain terms unnecessary to specify, to purchase the property for $230,000 on or before the 1st of January, 1894 (Exhibit 23, fol. 1581-7).

Griffith sent his own expert to examine the mine—a Mr. Lockhardt—who made his examination early in July, 1893 (fols. 575 and 1310).

In September, 1893, Griffith asked Sigafus if he would send him one of the Maxwell reports and maps, stating that he wanted to compare it with Lockhardt's report, as Lockhardt had made no map and the report was not readily followed out (fols. 892, 893, 1676).

Sigafus secured a copy of said Maxwell or Burnham report from Doran but unaccompanied by any map (fols. 573 and 896), and mailed the same to Griffith (894), and Griffith about the same time sent a copy of the report to James H. Platt, of Denver (fols. 572-4). This could not, on the evidence, have been the copy received from

Sigafus, for the one sent to Platt was accompanied by the map (fols. 219, 282 and 296), and the copy sent by Sigafus had no map (fols. 573 and 896), and Griffith had, at or before the time the report was received from Sigafus, no map himself, for he had lost the last one he had, being one obtained from some other source (fols. 573-4).

Mr. James H. Platt was believed to be a man of wealth, and Griffith wished to interest him in the property (fols. 219 and 362).

Platt sent the report and Griffith's letter accompanying the same to one John S. M. Egan, a mining expert, of Georgetown, Colorado (fols. 281 and 296).

Thereafter at the Oxford Hotel in Denver, in October, 1893, Colonel Platt introduced Egan to Griffith, and told Egan to talk over that California matter with Griffith, and Morse, one of the plaintiffs, joined them (fol. 331). This interview lasted about five minutes (fol. 360).

The testimony as to this interview is as follows :

Morse says : " The property was mentioned to Col. Platt and " myself by Griffith, and we talked the matter over. Col. Platt " said, ' We will send down and make an examination of the prop- " ' erty.' Egan at that time had the Burnham report, and he made " a remark that if the Burnham report could be verified it was a " mine ' made to order,' " and " he did not believe it could be. " That is why we sent him down. His instructions from Col. Platt " and myself were to examine the mine and report to us on it, with " a view to our possible purchase of it " (fol. 358).

" When he left Denver nothing whatever had been said as to " the arrangements for its purchase." " No arrangement or bar- " gain of any kind had been made with Mr. Griffith " (fol. 359).

Griffith says : " Morse said if the report was correct he believed " he could find a purchaser for the mine. It was then agreed be- " tween us that Col. Eagan should go to California and examine " the property, and if it was found to be as set forth in that report " that they would undertake [Col. Platt and Morse] to find a pur- " chaser for it back East " (fol. 554).

Egan says that he was asked by Mr. Platt to thoroughly examine the property and see if the Burnham report would be verified by such examination (fols. 219 and 291).

Egan went down to examine the mine about the middle of November, 1893, four or five days later (fols. 358 and 555).

Griffith met him at Riverside, took him to the mine, introduced him to Sigafus, and told Sigafus that Egan was the expert sent down by Platt and Morse for the purpose of examining the property and that they represented Eastern capitalists, and asked him if he had any objections to Col. Egan making an examination, and he said not, and the property was turned over to Col. Egan for examination. Griffith, who was called for plaintiff, testified: "I remember Mr. Sigafus telling Egan he could examine the property in his own way; do as he pleased with it" (fols. 554, 556).

Egan made his examination, occupying nine days, from November 16 to November 24, 1897, inclusive (fol. 1551, fols. 323, 326 and fols. 804 and 913), and made a typewritten report signed by him (Plaintiff's Exhibit C, fols. 1391, 1415).

During this examination Egan wrote certain letters to Morse and to Roberts, Col. Platt's private secretary, which were admitted in evidence as Plaintiff's Exhibits 13 to 19 (fols. 394-6 and 1546-65).

Passages in these letters throw light upon the capacity in which Egan acted in making his examination. Egan to Morse: "We "must get hold of this property, for it can be made a cool million." "We must plan a campaign at once, and, if I can help East, I, of "course, will do so. The price can stand a good margin of profit "and still be a gift." "If you see the Col. [Platt] talk it over "with him" (fols. 1548-9).

Egan to Roberts: "When you write Col. Platt tell him that we "have found a mine at last" (fol. 1551).

Egan to Morse: "Now, I telegraph you, as the matter must be "pushed through as rapidly as possible." "The price is too low "for the property, and we must get a big slice" (fols. 1553-4).

"Before talking over the purchase of this mine we must have a "consultation." "If any effort on earth can get the Mine we must "get it" (fols. 1555-6).

"Griffith and I start east Saturday night. Arrange time and "place of meeting with Col. Platt" (fol. 1558).

Egan to Platt: "It is the Mine that we have been looking for "for years." "You must write me at once or Griffith, and we "must be united; make every effort to carry it through, and "I think to take it up and carry it through it may be necessary for "me to go east also, and I will make any sacrifice to carry this sale "through." "Don't give the price east until we can meet and con-

" sult." " We must meet somewhere to consult and arrange a plan " of campaign " (fols. 1559-63).

Egan and Morse are shown by their own admissions and evidence to have been neither purchasers nor acting for any purchasers, but anxious to take advantage of Griffith's contract of purchase for the purpose of selling it after, or at the time of its purchase by Griffith, for an inflated value upon the strength of a report as to his examination of the property made by Egan, one of these promoters, who should pose before Eastern capitalists, if any were found, as a disinterested mining expert, but with the expectation of obtaining a large share of the profit of the transaction.

Griffith, Egan and Platt next met at the Astor House, New York, December 1st, 1893 (fol. 383).

Griffith had offered to sell the property, and Morse says: "I did " not know whether he owned it or who owned it at that time" (fol. 384).

Morse says further :

" Egan showed me what has been called the Burnham Report, " and also his own report, in the Astor House " (fol. 385). " There " was then talk of how we could interest some people in it to pur- " chase the mine at that time. Griffith thought Col. Platt was a " millionaire and could handle the whole thing, but he fell down " after a talk and said, ' I am sorry, but I have all I can do in con- " ' nection with these paper mills, and I cannot put in a cent.' " Then we left Col. Platt and came downstairs and talked the mat- " ter over, and I said I had some friends in Haverhill that I " thought I could interest in the property," " and the next day I " went to Haverhill and took the report to John L. Hobson " (fols. 361, 362, 564-5).

While Morse was in Haverhill he showed Egan's report and the so-called Burnham report to Porter & Hobson, talked the matter over with them and told them Egan was in New York. They asked him to go over to New York and bring Egan over (fol. 363).

Morse returned to New York and said he could sell the property, and asked Griffith how much of the profit he would give him and Col. Egan. Griffith said that was a matter depending entirely upon the price realized.

Morse said he could sell it for $400,000, and that he and Egan wanted two-thirds of whatever the profit was. That was orally agreed to between Griffith, Morse and Egan at that time (fols. 565 and 566).

Morse and Egan then left Griffith and went to Haverhill (fol. 566).

There Morse introduced Egan to Porter and Hobson, and Egan showed samples of ore (fols. 363-5).

After this Morse and Egan reported to Griffith that they were making the sale in Haverhill (fol. 566), and a few days later a contract was made between Griffith of the first part and Porter, Hobson and Morse of the second part, whereby Griffith sold the property for $400,000, $150,000 thereof to be paid in cash on or before January 1st, 1894, and the rest to be secured by mortgages (fol. 567 and Exhibit 1, fols. 1474-85).

Morse and Egan and Griffith thereupon went to California to close the purchase, Morse and Egan having first exacted from Griffith a written memorandum as to the arrangement for their profits or commission, providing substantially for the receipt by Morse and Egan, each, of a third of the excess of the price at which, through their efforts, Griffith had contracted to sell their property over the price which Griffith had contracted to pay for it (fols. 377-9 and 580).

To all these negotiations and contracts Sigafus was an entire stranger. On the arrival of Morse, Egan and Griffith, he was, for the first time, informed by Griffith of the sale to Messrs. Porter, Hobson and Morse (fols. 567-8, 368).

Sigafus then by proper deeds and assignments conveyed the property to Griffith, receiving $150,000 cash and $82,000 secured by mortgage (the $2,000 having been added to pay the California mortgage tax), thus making up the original price of $230,000, which, by the terms of Griffith's contract with Sigafus, was to have been all cash, but Sigafus consented to receive part in mortgage with $2,000 added to meet the said tax thereby incurred (fol. 578). The mortgage was made by Griffith and was to secure $100,000 in notes, *viz.*: $82,000 held by and belonging to Sigafus (as above) and the remaining $18,000 in three notes of $6,000 each, which Sigafus endorsed over to Griffith (fols. 569-70), and which Griffith caused to be made so as to enable him to give Egan and Morse a part of the amount coming to them (fols. 369-377, and Exhibits 4 to 11, fols. 1508-44). Sigafus did not know what arrangement, if any, existed between Morse, Egan and Griffith (fol. 580).

Griffith, thereupon, conveyed the property to Porter, Hobson and Morse, the consideration mentioned in the deed being $500,000 (Exhibit 8, fols. 1522-5).

After Porter, Hobson and Morse acquired title to the property, and without the knowledge of Sigafus, they, through their attorneys, Morse and Egan, executed a further mortgage to secure the remainder of the purchase price to Griffith, and to enable Griffith to complete the payment to Morse and Egan of their share of the profits. To accomplish this the property was mortgaged for $125,000, in addition to the prior mortgage, the said $125,000 mortgage standing as security for various notes, one being for $108,000 made to one Filius, a friend of Egan and nominated by him to be held in trust for Egan and Morse, on account of the secret agreement, whereby they were to receive a commission of two-thirds of Griffith's profits in fraud of their principals (Exhibit 11, fols. 1533-40, and fol. 1482).

Porter, Hobson and Morse took possession of the property by their agents January 1, 1894, and Egan was left in charge (fol. 233).

The alleged misrepresentation on the part of Sigafus, as to which any testimony was offered, may be classified as follows:

FIRST. False statements contained in the Burnham report, for which Sigafus was alleged to be responsible on the ground that said report was published with his consent and that he told Egan, when the latter came to examine the mine in November, 1893, that the figures it contained giving the bullion product were correct.

SECOND. The alleged fraudulent acts or concealments done or made, or caused to be done or made, by Sigafus in order to mislead Egan at the time of his said examination.

It will be noted that all misrepresentations upon which the plaintiffs relied came to them solely through Egan. They did not rely upon the Burnham report except as endorsed by Egan, and bought the mine upon Egan's representations (fols. 273, 385, 404-5, 507, 528, 534, 506). They had no communications whatever with Sigafus poior to the purchase (fol. 385, and test. of Parke, Hobson and Wood), and Sigafus is not liable for any errors or misrepresentations originating with *Egan himself;* he is only liable for errors or misrepresentations made by Egan in *consequence* of his own misrepresentations to him.

It is only necessary, therefore, to consider the evidence relating to conversations and transactions at the mine during the visit made

by Egan for the purpose of examining the property ; those conversations and transactions being the only ones had between Sigafus and Egan prior to the contract of sale with the plaintiff.

These conversations and transactions are here examined with the primary object of showing that they afford no competent or sufficient evidence of what the mine would have been worth if any erroneous statements had been true, or whether the acts complained of were committed or not.

The evidence will be briefly summarized under two heads, above indicated, *viz.:* (1) misstatements contained in the Burnham report, (2) alleged fraudulent acts or concealments on the part of Sigafus.

(1) The Burnham report :

The paper receiving this title and which Egan brought with him to the mine, was unsigned and undated. The name of Burnham does not appear anywhere in it (fol. 293, and Exhibit A, fol. 1416 *et seq.*). It refers, as to important particulars, to maps and photographs which are not produced (fol. 297), were not brought by Egan to the mine, or referred to by him or Sigafus, and without which it would be impossible to verify or disprove many material statements of the report. It did not purport to speak as of a date later than nearly two years prior to November, 1893, the date of Egan's examination. Egan testifies : "The copy," referring to said report, "has neither date nor signature, but from details and statistics "given I judge that it was made earlier than 1892" (p. 293). Egan says that Sigafus told him that Burnham had made two examinations of the mine and was a capable person (fol. 296), and there is no evidence to show that these statements were untrue. He also says that Sigafus told him that the figures showing the bullion product in the Burnham report were correct (fol. 250), but he does not say that he showed the paper he had to Sigafus, or that it was a correct copy of the Burnham report—(there is affirmative proof, on the contrary, that it differed from Burnham's first and original report, Exhibit A and Exhibit 33), or that Sigafus stated to him that it was a correct copy, or said that all the statements in any copy of the Burnham report were true. And, as Egan and all the plaintiff's witnesses aver and reiterate that Egan went to the mine for the declared purpose of himself verifying said report (fols. 219, 294, 308, 358, 554, &c.), there was no occasion for Sigafus to say that the statements in said report, at least, so far as they could be verified or disproved by inspection of the property, were true—and if he had said so, Egan would not have relied upon such statements (fols. 294,

307–8); and, if he had relied upon them, it would have been a breach of duty on his part (fol. 743–4 *et seq.*), and an omission to do the very thing he went there to do—namely, *not* to rely on the Burnreport, or on what any one might say about it, but to verify or disprove its statements by his own personal investigations.

In examining the testimony it will be well to keep in mind the following definitions:

FISSURE: The rift or fissure of the country rock across its strata. In it the vein and vein filling lies.

SHAFT: An opening or incline from the surface, extending down the fissure into the mine.

DRIFT: A horizontal opening from the shaft or other excavation in the mine.

LEVEL: A horizontal opening from the shaft laterally in the mine for use in entering it in and running out the ore.

Level and drift are often used synonymously.

UPRAISE: An opening from a level or drift upwards.

WINZE: An opening from a level or drift downwards.

VEIN or PAY STREAK: The quartz and rock-carrying gold.

GANGUE: Waste material in the fissure with the vein, frequently between two portions of it.

HORSE: A large rock of waste of gangue occurring in the fissure.

HANGING WALL: The uppermost side of the fissure, when the fissure lies at an angle with the surface.

As the fissure in this mine lies in the ground at an angle of sixty degrees, one of the walls hangs over the other.

FOOT WALL: The lower wall of the fissure.

STULLS and STULLING: Timbers put in the mine between the walls in excavations to hold them apart, or, in the level, to form the timbers of the roof level.

LAGGING: Boards put behind the stulls to hold the loose rock.

Alleged missatements in the Burnham report:

A. That the pay streak had an average width of two feet.

(1) The stafements of the report upon this point are as follows (Complaint, fol. 17):

At the end of the report there is a summary of what precedes and has been stated in detail in the body of the report. This sum-

mary contains the following item: "Width of pay streak, average of two feet" (fol. 1473). The body of the report, to which this summary refers, is as follows: Under the heading, "Width of Pay Ore," it is said: "Attatched to this report are the width in inches of the actual pay streak, taking every ten feet irresponsive" ([*sic*] probably copyist error for "irrespective"), "of condition of vein at that point" (fol. 1440).

Then follow some particulars not material to the present point, and then comes the *table of widths* (fols. 1442-3), showing the result of measurements taken every ten feet along the shaft, the winzes and upper and lower level of the mine. There are 109 measurements in this table, and a total of widths amounting to 2,645 inches, showing an average of about 24 inches, and, as measurements were taken every ten feet, covering about 1,009 feet of the openings.

At the end of the table it is stated, "But the steady width of pay is 18 inches throughout, increasing as they go north gradually" (fol. 1444).

It is elsewhere stated in the report that "the number of feet development by present owners is 2,900 feet, as can be seen by map" (fol. 1429), (left behind him in Colorado, when he visited the mine, and not compared by Egan), "continuous development or ore shoot 900" (fol. 1429)—*i. e.*, 900 feet on each level, making 1,800 feet, while the shafts and winzes made up the rest of the 2,900 feet, total amount opened up. The table of measurements only includes 85 measurements in the levels—580 feet on the first level and 270 on the second, or less than half of the levels opened through the vein, and only 240 feet of the winzes (fols. 1442-3).

These statements taken together do not amount to an affirmation that the pay streak throughout had an average width of two feet, but only that that was the average width of the vein included in the table of measurements.

(2) In this, as in other matters, the Burnham report speaks as of a date, at least, twenty-two months prior to the time of Egan's examination.

(3) Egan did not *rely* or accept Burnham's statements of the average width of the pay streak; he made his own measurements, and relied on those measurements in making his report.

He states in his report: "Before stating estimates, I would premise that I made estimates every ten feet, and against the mine" (1403).

Speaking of his examination of the mine, he says that, after taking the measurements of the distances between the mill holes and manways: "I started at the first stope near the shaft, measured its height and length between mill holes, and, at every ten feet or so, measured the width of the ore body, and taking samples when I thought it judicious to do so. This was on the first level north. I went through the same method of examination on the first level south. I started at the shaft, and measured from mill hole to mill hole, and measured the height of the stopes above the level, and measured the ore body, about every ten feet, where practicable, and took samples on both levels. In fact, I went through the same operation on all of them" (fols. 229-30).

In his report, he does not state what is the average width of the pay streak, derived from his own measurements. He says the smallest measurement taken was six inches, and the largest 62 inches. Taking the average width of the ore, or pay streak, of the four levels, based on his calculotion of ore in reserve, and it amounts to over 25 inches (fols. 1405-6).

As a result of the whole evidence on this point, it is indisputable that:

1. The statement in the Burnham report clearly means that the exposed parts of the vein, covered by the table of measurements, showed an average of two feet pay streak, which was true, and that the steady width of pay was "18 inches throughout," which was true at the time of Burnham's report, and remained true after the purchase by plaintiff (fols. 278, 1212, 1285).

2. That whatever may have been the statement in Burnham's report in respect to width of pay streak, it was absolutely *not* relied on in making the sale, which was made solely on Egan's measurements, and neither Egan nor the plaintiff was deceived or misled by any statement in Burnham's report as to width of pay streak.

Such statement, therefore, should be eliminated in considering the question of damages and any instruction to the jury or hypothesis submitted to an expert, whereby the jury were instructed and allowed to consider in estimating damages, the difference in value in the mine, between what it would have been worth if its pay streak had had an average width of two feet as compared with an actual average width of eighteen inches, was grave error.

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It is charged that the Burnham report states that 2,434 tons of ore from said mine had yielded an average of $23.78 per ton, and that the ore taken from the mine for two years or more had averaged $23.78 per ton (Complaint, fol. 17).

The statements of the report in this respect are directly contradictory, showing manifest mistake or inaccuracy, but while this might confuse, it could not deceive any person reading through the report.

At folios 1435–37 is a table purporting to be the returns of gold bullion from U. S. Assay office to the Good Hope Consolidated Mines, covering the period from March 14, 1890, to February 1, 1892—the last date in the report, which foot up less than $52,000.

At folio 1449 occurs this : "The production of $57,879.78 during "the past year" (*i. e.* the year ending Feb. 1, 1892). This manifestly refers to the past two years, not one year. The report at folio 140 makes this explicit statement :

"The exact tonnage of the mine, month by one month, *does not* "*appear* (italics ours), but in statements forwarded by the superin- "tendent to the owners every other day, beginning July 14th, there "appears a number of car loads of ore hoisted, which is 1774. "These cars hold $12\frac{3}{0\,0}$ cubic feet, weighing from 1200 to 1500 "pounds per car," which makes 1197 tons of 2,000 lbs. each. * * * "The tonnage was obtained by carefully measuring the openings, "and what ore was taken from the stopes" (fol. 1460). After the earliest "July 14th" mentioned in the table, that is, July 14th, 1891, there appears in that tab e less than $22,000 of returns, which would make an average of $17.97 instead of $23.78 for the 1197 tons mined during that period.

The table of assays in connection with which the statement is made as to the entire mill run, although it is said to leave out special assays of rich samples nevertheless retains a number of samples of most exceptionally rich ores, *e. g.*, ores averaging over $100 and $200 per ton. Leave those out, *e. g.*, leave out the few samples of $100 per ton and upwards, four out of seventy-eight samples, and the average of the table is $18.17 ton.

Comparing the statement in the report, that the total mill run prior to the report showed by assay an average of $23.78 to the ton, repeated in the summary, and that the past *year's* product amounted to $57,879.78, when the preceding table of returns shows that it was a little less than $52,000 for the past *two* years, and it is manifest upon the face of the paper that there was an error in the

copying or in the original statement, and such an error that no person examining the report with ordinary care would fail to observe it. This is made still clearer by another statement in the report. The paper says that the author had been informed that the production of the old workings *(i. e.*, before the ownership of Sigafus began two years prior to the report*)* was $260,000 (fol. 1419). At the end of his summary he gives the estimated *total* bullion produced as $317,879.78—*i. e.*, the $260,000 plus the *total* amount produced since up to the date of the report; *i. e.*, plus the *two* years' production under the ownership of Sigafus. Now, the sum $317,879.78 is made up by adding to the $260,000 00
the alleged production "during the past *year*" noted above, *viz.*: 57,879 78

$317,879 78

clearly showing that "past year" is meant for past *two* years, and the mistake in addition whereby the amount is made fifty-seven thousand odd instead of fifty-one thousand odd, may have arisen from mere error of computation, or in transcribing the figure seven, being readily mistaken for the figure one. However it happened, the report can only be intelligently read by understanding that the $57,879.79 refers to the past *two* years' product—the total product of bullion for that time. That much is perfectly clear.

Taking the whole report together, it was impossible that the calculation $23.78 per ton, as an average based upon the rough and uncertain estimate of the tonnage from the sizes of the excavations from which the ore was taken, could be correct.

Nor did Egan in any manner rely upon such calculation, or upon statements he received upon the subject from anybody. In his report he gives the official bullion returns for the months of July, August, September and October, 1893, preceding his examination, showing monthly averages as follows: July, $17.25 per ton; August and September, $16.69 per ton; October, $16.52 per ton; average for the whole, $16.81; and he takes for his estimates of ore in reserve—*i. e.*, ore in the mine not taken out—$17 per ton, that being his calculation from the said bullon returns and his own tests and observations (fol. 1403–5). The mine was bought on the final estimate of the expert who examined it to verify and compare the report as to the past and its *then existing* condition, and he certified

that he estimated the ore as showing a value of $17 per ton on the average.

In view of this testimony to permit the hypothetical question to be put to an expert as to what the value of a mine would have been if, referring to the date of its purchase, the ore had averaged *$18* a ton free milling gold, which was *not* what it was represented to be, or to be *estimated* to be, and then permit the jury to adopt the rule of the difference between the alleged represented value and the actual value, was, also, grave error. The difference of a dollar a ton on Egan's estimates of ore in reserve alone would amount to $46,922, and on ore in sight, $19,833; in all, $66,755.

The other statements in said paper said to be a copy of the Burnham report alleged to constitute false representations, on which the plaintiffs relied, may be briefly considered.

1. The statement that the last *year's* product of bullion was $57,879.79, and that the total expense of said production was $15,000 (Complt., fol. 17).

It has already been shown that the statement of the product of the bullion manifestly and on the face of the paper, refers to the whole product for the past twenty-two months, or the whole period of nearly two years, and not one year. As to the statement of the expense there was no evidence introduced to show that the statement of expenditures made and of the cost of production based thereon was false.

2. That the estimated total bullion product since its discovery down to about February 1st, 1892, was $317,879.78 (Complt., fol. 18).

This is not a statement of fact, but of tradition. It is made up by including $260,000 as the result of past workings, which the writer of the report says he states merely on information. Egan admits that he did not consider the statement of any importance or attempt to verify it (fol. 314).

3. That, "beyond all doubt," the ore in said mines averaged to carry at least $18 per ton in gold (Complt., fol. 18).

That was nothing but a mere *opinion*. As above shown, it was not accepted or endorsed by Egan, whose estimate was $17, and the sale was not made on the faith of any representation that as matter of *fact* the ore averaged $18 per ton.

Egan's estimate was the *only* one on which the plaintiff could have relied. What may have been the ore in reserve or the ore in sight

in February, 1892, was immaterial, the sole question was what was the ore in reserve or the ore in sight in November, 1893, when Egan made his examination. This Egan found to be of ore in reserve 46,922, valued at $797,674; of ore in sight, 19,133 tons valued at $337,161, and those representations were the only ones made to the plaintiff as to the amount of ore just preceding their purchase.

4. That said mines contained 44,733 tons of gold ore in reserve of the net value of $805,186, and also contained 37,333 tons of gold ore in sight of the net value of $761,094 (Complt., fol. 18).

In the first place, these were two statements of pure *opinion* and *estimate*, and not of fact, and, in the second place, Egan made his own examination and report as to this, and this report, speaking of a time at least twenty-one months after the so-called Burnham report plaintiffs had in their hands when they made their investment.

5. That said property had a very large prospective value in addition thereto (Complt., fol. 18).

This is a mere statement of *opinion*, the correctness of which is corroborated by the opinion of Smith & Goldsworthy, defendant's experts (pp. 393 *et seq.*), and no development of the additional property was ever made to show whether or not it was a mistake.

6. That the gold-bearing vein was a permanent and lasting one (Complt., fol. 18).

In the first place, this also is a statement of *opinion* and not of fact; in the second place, Egan examined the property in order to form his own opinion, which he stated in his report; in the third place, there is no dispute that this is a true fissure vein, and that such veins are, as a rule, permanent and lasting, nor is there any evidence that the end of the vein has ever been reached.

7. That the property under an energetic management should produce from $30,000 to $40,000 per month net, and keep the development even with the output (Complt., fol. 18).

This is too manifestly a mere expression of opinion to require comment. Under the plaintiff's company the mine, as the evidence shows, never had an efficient or energetic management.

II.

Alleged fraudulent acts or concealments done or made, or caused to be done or made, by Sigafus in order to mislead Egan at the time of his examination of the mine.

These are as follows :

FIRST. Method of stoping employed in the mine alleged to be deceptive and fraudulent.

This charge amounts in substance to this: in stoping or excavating the vein, the cutting followed the widest parts, giving, it is alleged, an appearance of a continuous pay streak of more nearly uniform width and richness than if the cutting had been driven straight through, irrespective of any variation in the width or richness of the vein.

It is alleged that the ore was unevenly distributed through the vein, and, in excavating the vein, to use Egan's language, "when the streak was small they followed it till it got big, then leave it standing" (fol. 279). The only consequence of this would be that the excavation would show a wavy line in the hanging wall following the widest parts of the vein.

Assuming this to be so, the form of the excavation was no representation of anything that did not exist, was not calculated to deceive a competent miner, and it is impossible to assume that any different state of affairs than that which actually existed to have been definitely or in any manner indicated by the appearance of the vein after excavation, assuming it to have been excavated in the manner alleged by Doran and as just described.

The assumption, upon which alone the suggestion of any deception arising from this method of excavation rests, is that, if a wavy line excavated through a fissure vein shows a general uniform width of quartz-bearing gold, this is decisive evidence that the vein maintains the same *width* and *richness* as high as it may go vertically in either direction. If this assumption is *not* correct, then the fact that the vein carries gold for a generally uniform width, along the line of its exposure, especially where that line is wavy and irregular, is no warrant how far it may preserve that width above that line or exposure, or below the lower wall of the level, or how far the vein may continue that width, if exposed in either direction horizontally. Now, there *is* no assumption from the width of the exposure what may be the width above or below or beyond in either direction.

The precise contrary is testified to without contradiction. In all mines, and especially in fissure mines, the gold is distributed unequally, leaving rich and poor places in the vein. Doran, the plaintiff's witness, admits this, saying: "My observation has been that there are rich places and poor places in all mines" (fol. 101). Mr Smith, whose thorough competency as a mining expert is manifest from his whole evidence, testifies as follows:

"Q. Is there a formation in the mine which you would term "kidneys?

"A. No, sir; the ore is wavy—not always of the same thick "ness; it widens out in places, pinches in in places, and widens "out again.

"And does it not seem to make much difference where you find "a pinch; if you go down you will find it to widen out, or if you "go up you will find it the same way?

"A. Yes, sir, and not always at equal distances. There is no "rule that you can follow to find it.

"Q. According to your experience as a miner of veins of this "character, suppose it had been without pinched places, and had "an average uniform width, say, of two feet, would that be consid- "ered to give a better promise of richness than to have the variety "and size and pinched places as it is?

"The formation of this mine is the best with the pinched veins "rather than to have it uniform."

Rec., pp. 404, 405.

Now, as long as the gold is not distributed evenly through any vein, as it may constantly vary in richness down to absolute barrenness, the fact that a vein of gold of a generally uniform width is exposed, and especially is exposed at *different heights* from the *foot wall*, only shows that there is certainly a wide or rich deposit of gold *along that line*, but what it may be above or below that line, where it has not been exposed, is merely conjecture. Only one thing is practically certain—it will not remain of *uniform* richness; it may be richer, it may be poorer, but it would be against the rule of nature to have it remain continuously uniform. In this very mine the table of widths of pay streak, at page 481, contained in the so-called Burnham report, varies from seven to thirty-nine inches, and Smith's measurements show that it varied throughout the mine from two inches to eight feet (fol. 1212). The assays reported in the said Burnham report shows the widest divergeness in richness

from $1, $2, $4 and $6 a ton up to $100 and $200 a ton and upward. The exhaustive and careful asseys, by Smith and Goldworthy (pp. 575 *et seq.*), show a very wide variation all the way from $1.10 and lower a ton up to several hundred dollars, and, in one case, upwards of $1,100 a ton. Egan's assays, reported in his letter (Deft.'s Ex. C, fol. 1665), show variations from .27 of an ounce gold (1st Col., at one point on 1st level north) equal to $4 and $5 to the ton up to $39.80, equal to upwards of $100 to the ton. Furthermore, the alleged method of stoping only affected the hanging wall, and, in order to calculate the ore in reserve, Egan must not only have also examined the exposure in the foot wall, but the exposures in the vertical walls of the uprights and winzes, in order to get the sides of his blocks, and thereby must have examined vertical cuts through the vein, which must of necessity have gone through rich and poor streaks, and concerning which there is no pretense that any attempt was made to follow rich streaks, nor would that have been possible, the uprights being straight shafts driven from one level to another. Egan, it will be noted, reported that he measured every ten feet along the backs of the stopes and in the bottom of the second level (fols. 229, 230, 231).

It is clear, therefore, that the fact, even if it existed, that the stoping through the hanging wall along part of the levels followed the widest and richest part of the vein as it was uncovered, the bottom and uprights of the level being driven straight through the vein, could not mislead as to the unexposed portions of the ore contained between the vertical and horizontal exposures. The ore actually visible, rich or poor, spoke for itself. The rich part might or might not hold out—how far it would continue no human being could tell. To say how much more the mine was apparently worth because of the disclosure of the rich places, which were actually there, than it would have appeared to be worth if they had been partly covered, is a simple impossibility. It does not afford the basis even for a conjecture.

Second. Alleged concealment of parts of the mine by stulling and lagging.

This charge, in brief, amounts to this: In opening and maintaining a level wooden uprights or supports are necessary and wooden upper or side walls are made, and these are naturally left where the mine has already been worked, or where it is not worth working and access to the parts covered is not required to take out

the ore. There were some such places on some of the levels in this mine. The assumption is that Egan was entitled to assume, without any examination and with full opportunity for examination, that wherever the boarding was erected it covered pay ore, or pay ore had been taken out of it—no representations having been made to him on the subject.

The testimony on this point is briefly as follows: "Stulling" is the heavy timbers fastened into the walls of a mine (*i. e.*, to hold the walls apart, fol. 741), and "lagging" is the boards put on the stulls to hold the ground on the sides or above (fol. 78). About thirty feet of the first level north had been both stulled and lagged. This had been done in regular course as the level was opened. Cheatham, the superintendent, testified, "if the stulling and lagging had not been there it would have all caved in and shut the level up" (772, 773).

In other levels the same thing occurred—the pay streak being exposed all through all the levels except some 150 or 160 feet in all. It was impossible to drive and maintain the drifts and levels without the stulling and lagging (fol. 888). There is no evidence that there was anything improper or unusual in this method of mining. Such barren streaks, as there were, were visible and were seen by Egan (fol. 777). He reports and testifies that he measured the vein every 10 feet horizontally along the backs of the stopes and throughout the mine, and fortified these measurements by measurements in the raises or perpendicular openings, and, in addition to that, measured the width of the vein along the bottom of the second level (fols. 1403–1409), and says (fol. 240): "The samples that I "took, in my judgment, fairly represented the production of the "mine, as then exposed to my examination. I did not take any "samples from the parts of the mine that had been worked, but was "then concealed." In addition to that, in estimating his ore in reserve (at fols. 1405-6), Egan figures but 517 plus 117, or 634 feet of the 700 feet of the first level north, and but 670 feet of the 700 feet of the second level north, thus allowing *66* feet in one instance and *30* feet in the other for barren ground.

Furthermore, Egan was not warranted in any event in making an estimate of stulled and lagged ground which he did not examine (fols. 740, 1204). Upon this all the experts agree, and it is manifest that it must be so. Parts stulled and lagged must be omitted as exhausted or barren. At all events it is clear that no person exam-

ining a mine, with a free hand, as Egan did, had a right to assume *anything* as to concealed ground without examining it.

Olcott, plaintiff's witness, says: "If the stulling and lagging "prevents my examination of the roof of the level, I do not figure "that in as ore in sight or ore in reserve, because there would be no "stulls there if there was ore. The stulls would not be there until "the ore was extracted. The stulls are never there unless there is "ore removed, ordinarily speaking." "To hold the earth up we "timber the soft ground, which is entirely different from stulling, "and lagging over that. You can always examine the top of the "level by breaking through the timbers."

Q. "But suppose you do not break through and do not examine; "would you, or would you not, figure it in?"

A. "Your hypothesis is not intelligible." I would break through and examine it. "An expert should not figure it in as ore in re-"serve or in sight, without examining it" (fols. 740–742).

The square setting was not necessary in this mine, the walls being sufficiently hard to permit the use of stulls with a head board, but the purpose answered was the same (fol. 772).

Goldsworthy, defendants' expert, says:

Q. "Assuming that the mine was in that condition of develop-"ment in November' 1893, as shown by the model, would there be "any difficulty in any expert going through that first level, if he did "his duty, in ascertaining the barren spots, or in ascertaining the "character of the ground behind where it was stulled and lagged "for 120 feet?"

A. "I cannot conceive any difficulty" (fol. 1268).

It is impossible, from the existence of the stulling and lagging, to support a charge of deceit or misrepresentation, or to afford any ground whatever for the allegation that the mine would have *appeared* ty be worth less if the stulling and lagging had not been there, or *how much* more valuable it would have appeared if such stulling and lagging had not been there.

THIRD. Allegation that the ends of the lower levels, north and south, had been boarded up and that Egan did not know that the excavations had been carried 150 feet beyond the boarded end at the south and run into barren ground, and that at the north end the excavation had been run some eighty feet beyond the board and had also run into barren ground because it was run in a wrong direction and missed the vein.

This charge may be very briefly answered:

(a) There was contradictory testimony as to the south end. The defendant's witnesses testified that there was no difficulty in passing the point alleged to be obstructed, which simply had a rough structure there for purposes of ventilation, and that Egan passed beyond it to the face of the drift (fols. 757, 758, 765-667, 783-786, 787); but passing all controverted points the south end of the mine showed the dividing and probable ending of the vein in that direction or, at least, its running into a "dyke" or refractory ground which would be too expensive to work. The Burnham report, which Egan says he had before him, states on this point: "To the south the vein has been found and still shows good pay "*though the streaks divide*, and probably *the end* of *all pay ore to the* "south is covered by the locations owned by the company" (fol. 1424).

Egan does not say anything in his report in regard to this end of the mine, except he says after his resumé of values: "Besides "this ground there is territory to the south 1,900 feet long with an "undeveloped value" (fol. 1413). The plaintiffs cannot claim that they were deceived as to ground which was reported to them as having an undeveloped, *i. e.*, an unknown, value. Egan claims to have discovered, after taking possession, that, "commencing about "eight feet above the bottom of the second level south, the drift "had been driven south from the south shaft about 150 feet; and "that at the south end of the vein, or what little there was of it, "was split up and deflected about thirty degrees, and was in hard, "tight granite, and so, compared with the rest of the mine, was "barren" (fols. 234, 235).

And says:

"In the south drift it showed the termination of the ore body "disclosed in the workings between the main and south shaft, and "it was also evident that a great deal of expensive prospecting "would have to be done before any ore body could be found. In "fact, it looked as though the vein had split up never to come "together again" (fols. 234, 235).

This, in substance, merly confirms the statement in the Burnham report. Defendant's superintendent says that this extension of the second level was in the vein, a small vein, all the way, and that there had been no stoping there (fol. 787), and, it will be noted, Egan does not deny this. And, then, it appears that the vein

divided and came to an end, and that was the very thing Egan was warned to expect.

(b) As to the north end:

No representation is pretended to have been made by Sigafus in regard to this end, and the only representation that is relied on is testified to by Mr. Egan as follows:

"I asked Cheatham if the pile of *débris* at the end of the drift "in the second level north was up against the breast. He answered "that the drift might have been driven five or six feet further, but "that that portion of the drift had been driven whilst he had been "at work on a neighboring mine" (fol. 230).

Egan states that after he took possession of the mine he found that behind the *débris* the level had been run eighty feet further into "a streak of rotten granite that had evidently run off the "vein," and that this was "simply a case of mistake in judgment in "losing the vein" (fols. 234, 235).

This was immaterial, therefore. It only showed that in order to follow the vein excavation must be commenced back at the starting point where it ran off the vein, and this was in fact done; and at the time of Egan's examination they were putting up a raise to connect with a blind drift or exploring drift driven from the stope above the pile of *débris*, and the Smith & Goldworthy map shows that subsequently the workings followed the pay streak in this direction fifty-five feet further.

Egan says that when he arrived he asked Sigafus for a working map of the mine and Sigafus told him he had no working map, but made a rough sketch showing the main openings of the mine, stating about the lengths they were opened, but he does not say that he gave any length for the lower levels; he only claims that he gave him to understand or said that his sketch gave the full extent of the main openings of the mine (fols. 6, 223, 255, 226).

As Egan was just about to go down and measure the mine for himself, this statement cannot be regarded as a representation as to any particular length of feet in either direction, to which the lower levels had been carried.

But whether the extreme ends had been opened or not, it is impossible to allege a misrepresentation or deceit founded on that fact. Egan saw that there was a pile of *débris* at one end and some boards at the other. He does not say that any one told him to what extent if any the level had been driven beyond in either direction. The superintendent said that the north end might have

been driven five or six feet further, but that he wa absent working in another mine when that portion of th drift had been driven. That was all. Egan, therefore, had n right to assume what lay beyond the visible end of the level. H could not expect anything different from the fact, *viz.:* at the sout end, a division of the vein which he had been warned, by Bur ham's report was there, at the north end, a mere accidental loss the vein, which they were at that time engaged in recoverin There is no possible measure of damage to be found in these fact Suppose no excavation had been made, he would have no right assume that the vein might not take a trend there that would mak it necessary to pursue it at a higher level by drifting as they we then doing. There is no pretense that the vein came to an end that place. How much more would the mine have been apparent worth if the breast of the level had been unbroken, than if it ha appeared that a false lead had been had at that point? All behin the breast would have been conjecture. Any difference in value not susceptible even of the rudest calculation.

FOURTH.—Allegation that Sigafus fraudulently put rich ore int the experimental mill run made by Egan, and that the tallies of th number of carloads run were fraudulently diminished so as to mak it appear that less than the actual amount of ore was run throug the mill.

This charge is most conclusively met and denied in the evidenc for the defendant, but it is unnecessary to discuss any aspect of th question involving a consideration of conflicting evidence. Th material fact is this: Egan had made, under his own supervision, mill run of a certain amount of ore. He called it twenty tons, t arbitrarily counting a certain number of carloads as a ton. Ac ually these cars contained, and it is demonstrable that he kne that they contained, over forty tons, and taking their contents the true amount, the mill run showed an average of $15 to $17 p ton, thereby exactly corresponding with the result of the la official returns preceding the said mill run, *viz.:* the return for Jul August, September and October of 1893, which show an average from $16.52 to $17.25 (fol. 1404). This shows that the mill ru run could not have been tampered with, and there is no evidence allegation that there was any misrepresentation or deceit as to th capacity of the cars. The material facts elicited by the evidence to this charge are as follows:

Egan testified that he had several conversations with Sigafus about the mill run.

"He" (Sigafus) "asked me if I wanted 200 or 300 tons run. I "told him I would like to, but that I would only have time to run "about 20 or 30" (fol. 243).

"I requested him to have his mill men or some one take samples "of the crude ore and tailings every alternate hour." "I directed "the mill-run to be made. I made the arrangements for a mill-run "with Mr. Sigafus and with his foreman Cheatham. The amount "of ore was to be 61 cars, which we decided would be about equiv-"alent to 20 tons" (fols. 243–4).

Egan's report as to this is as follows:

"The test run of 25 tons was conducted as follows: "The ore "was taken from every level of the mines and at various points. It "was mined, hoisted and milled under my supervision, the plates "cleaned up, the amalgum retorted and the retort weighed in my "presence." "I took in this test the quartz alone, and as little "outside the vein filling as possible in order to get a test of the ore body itself as far as possible" (fol. 1407).

It appears that cars ran in the levels to the shaft, and were dumped into another car or skip which ran in the shaft to the surface (fol. 799), and that tallies of these cars were taken and kept by Cheatham under Eagan's instructions, and turned into him (fols. 244, 803).

The cars which ran in the levels held between twelve and thirteen cubic feet. The Burnham report states that these cars held $12\frac{3}{16}$ cubic feet, holding 1,200 to 1,500 pounds (fol. 1460), and Egan says that, if the same cars were used when he was making his examination, the figures are correct (fol. 322). In other words, that he measured the cars when making his examination and knew them to correspond to the said figures, *i. e.*, knew their contents in cubic feet and pounds. This measurement is substantially corroborated by all who testified in regard to it, both plaintiffs' and defendant's witnesses (fols. 624, 668, 700, 1176, 1201, 1300). And it is also uncontradicted that the car or skip which ran in the shaft would hold sixteen cubic feet, or 1,680 to 1,728 pounds (fol. 700).

Egan says that *three* cars were taken by him as a ton (fol. 321), and that he reckoned sixty-two cars as twenty-five tons, because he noticed that the ore was dry and the cars full (fol. 274).

Egan, therefore, *knew at the time* that the sixty-two cars, if they were cars which ran in the levels, contained *forty* tons, and if they

were cars which ran in the shaft, *forty-seven* tons instead of *twenty-five* tons, as he reported, thus showing by his own figures that his mill-run actually produced, under *his own observation*, from $15 to $17 per ton *instead of* $36, as he reports (fol. 1210).

Another fact discloses the impossibility of the mill run having consisted of only twenty-five tons. The plaintiff's witnesses testify that the mill run occupied not over three and one-half days (fols. 192, 244, 333 and 556).

That this is incorrect conclusively appears from Egan's own letters written at the time and admitted in evidence (Exhibits 13, 14 and 15).

His letter of November 18 says: "I have just completed my "*third* day's work here, and in a snowstorm." "*I am having mill runs made*" (fol. 1547).

And his letter of November 19: "This is my *fourth* day at the "mine and it will take until about the 26th to get a good mill run "through under my supervision" (fol. 1551). And his letter of *November 23*: "I am now having twenty tons of ore that I have "picked out from various portions of the mine run through the "little trap they have here and shall get through to-morrow night" (fol. 1552).

And it further appears from his testimony (fol. 326) that he went away on Saturday after the 21st of November, 1893. And that the report was completed on Friday after November 21, 1893 (fols. 323 and 326).

Friday by the calendar was November 24th. The mill run, therefore, occupied from *November 18th* to *24th inclusive—six* or *seven* days.

The evidence is that the Bryan mill, the one used, and the only one at the mine, would crush six to ten tons a day (fols. 1560, 191).

As the number of cars sent up was sixty-two, there must have been from forty to forty-seven tons crushed during the run. The plaintiff alleged that the tally was wrong and that even more than sixty-two skips were run through the mill. Crushing from six to ten tons per day and allowing for the time taken for cleaning up the mill would crush just about forty to forty-seven tons in six or seven days, allowing for not running whole days either the first or last days of the run. It would certainly be impossible to crush the admitted amount of 62 skips, and still less, a greater number than 62 skips in three days and a half, because the capacity of the mill would not admit of it. The length

of time consumed by the mill run, therefore, corroborates the result reached by correctly calculating the cubic contents of the cars.

In view of the preceding, it is wholly unnecessary to consider the question raised at the trial, whether or not some ore that had been before mined and was lying in sacks in the level and was used in the mill run was exceptionally rich ore. Assuming it to have been all that the plaintiffs claim it would have added about five dollars in value to the whole run, *i. e.*, assuming the sacked ore represented, as plaintiff's witnesses claim, ore running twenty dollars to the ton, there were twelve sacks at forty pounds each, which all together would equal about quarter of a ton, or five dollars in value (fols. 130, 131); nor is it worth while to discuss the story, not only improbable but, in essential particulars, impossible, told by Doran, a hostile exemployee, and his wife about the alleged surreptitious putting gold into the mill run by Sigafus, nor the evidence as to more than sixty-two skips having been run to the mill. All these allegations are explicitly and circumstantially denied by defendant and his witnesses, but as the result of the mill run, already discussed, shows conclusively that there was nothing exceptional or unusual in the product of the run, this fact, of itself, disposes of the allegation that there was any fraud or deception about it.

In addition to the foregoing, the mill run was not relied upon by Egan in estimating the value of the ore in the mine and its result afforded no data materially affecting the value of the mine. Egan states that in making his estimates he took, not the result of the mill run, which he untruthfully represented in his report as showing thirty-six dollars a ton, but seventeen dollars a ton, derived from the official returns of the preceding four months (fol. 1403). If he had reported the mill run correctly, showing, as it did, almost exactly seventeen dollars a ton, it would not have altered the value he put upon the mine. And the result of a run of a few tons, twenty or twenty-five in a few days, could not have afforded data, even had it shown a lower or higher average, which would prevail against the recorded results of the run of the mill in the ordinary course of business for four months just preceding.

Even assuming that the run had actually shown the result falsely stated by Egan, it is impossible to say that, in view of the returns, it could afford any evidence sufficiently definite to enter into the measure of damages, or, indeed, any evidence whatever of

what would have been the value of the mine, if it had shown an average of thirty-six dollars a ton, for the twenty or twenty-five tons run through, as compared with its value if it had shown an average of seventeen dollars a ton, or less, practically the same as that of the returns.

The foregoing is the substance of all the alleged misrepresentations made by the plaintiff in error or for which he was held to be responsible, or any deceit practiced by him in the sale, as disclosed by the plaintiff's proof or uncontradicted evidence, setting aside the testimony introduced to refute the plaintiff's charges, where that testimony was contradicted.

In respect to these alleged misrepresentations and acts of deceit the evidence supports the following conclusions:

1. The *only* misrepresentations with which the plaintiff in error can be charged are those made to Egan. He had no negotiations with the plaintiffs. The claim is that he misled Egan and Egan misled the plaintiffs. He is not responsible for any errors or misrepresentations made by Egan which were not induced by him, but originated with Egan himself.

2. The alleged misrepresentations to Egan consisted in:

(a) Misstatements in the Burnham report endorsed by Sigafus.

(b) Direct misstatements by Sigafus.

(c) Fraudulent acts by Sigafus, consisting in:

(1) Acts of concealment.

(2) Surreptitiously increasing the richness of the mill run.

Taking these in the order named:

(a) The Burnham report:

(1) This was an unsigned, undated paper. Assuming that there was evidence that it may have passed through the hands of Sigafus when Griffith asked for a copy of the Burnham report, there is no evidence that Egan showed the paper to Sigafus, or that Sigafus was asked to identify it in any way, or whether the unsigned paper was a correct copy of the report, or whether all its statements were true. He said that the figures giving the bullion product were true; and, even if Egan applied this remark to the paper he had, the statement on an examination of the whole paper would correct itself. Sigafus denied that he made the statement.

(2) Egan did not rely upon the Burnham report, nor did the plaintiffs. He came to examine the mine for the very reason that he

did not rely upon it, and the plaintiffs relied upon Egan's report and examination. There was, therefore, no occasion for Sigafus to endorse the Burnham report. He was not asked to do so, nor, if he had, would his endorsement have been acted on. It is the very gist of an action for deceit by false representations that the representtions should be relied on. If a seller of a house say to a purchaser's agent, "The width of the foundation walls is three feet and they extend four feet into the earth; they were measured by a competent mason, and he so reported, and his report is correct," and the agent answers, "That may be so; but I am a mason "myself, and have been sent to measure personally, on behalf of the "purchaser, so as to see whether your mason was right," and the seller replies, "Very well; there is the house; take your own rule "and tape-line, and your own time and way, and make your own "report," and the purchaser's agent accordingly measures and reports the result of his own investigations; then, whether the first mason's report was true or false, and whether the purchaser, had his single statement been accepted, might not have been liable on a warranty, or even for false representations, if he knew his mason's report was wrong—he certainly could be held on neither ground in the case supposed, because his statement was *not* the statement *relied on* in making the purchase. The facts showing that Egan came to make his own independent investigation, and did not rely upon the Burnham report as to anything determinable by inspection and examination of the property, are established by the concurrent and undisputed evidence of both sides. The language of this Court on this point in *So. Development Co. vs. Silva* (125 U. S., 248, 259) is as follows:

"It is essential that the defendant's representations should have "been acted on by complainant to his injury. Where the pur-"chaser undertakes to make investigations of his own, and the "vendor does nothing to prevent his investigation from being as "full as he chooses to make it, the purchaser cannot afterwards "allege that the vendor made misrepresentations" *(Attwood vs. Small, supra; Jennings vs. Broughton*, 5 De Gex, Macnaghten and Gordon, 126; *Tuck vs. Downing, supra).*

(3) The Burnham report spoke of a period nearly two years, certainly over 20 months, prior to Egan's examination, and did not purport to give the condition of the mine at the last-named date, before which important changes may have occurred. *E. g.*, the intermediate development might have altered the aver-

age of the pay streak, as more of it was uncovered; later returns might show a higher or lower average of ore to the ton, and the like. As matter of fact, Egan took the average ore to the ton from the official returns for the past four months preceding his examination. The extent to which the vein was opened might and did vary, and Egan took his own measurements.

Consequently, as to all these particulars, the statements of the Burnham report were not statements of the then condition of the mine, and were not relied on as such.

If they showed a higher average of ore than the mine was then producing, as shown by the latest official returns, or a larger body of ore than was then visible, as shown by Egan's own measurements, they were statements that did not *enhance* but *detract* from the apparent value of the mine, for they tended to show that it was running out and beginning to show exhaustion.

(4) As to certain errors in the report, such as the manifest error in stating in one place two years' product as one year's product; if the whole report is read, they correct themselves, and under any circumstances afford no definite measure of the value of the mine nearly two years later, and in the face of later reports and examinations.

(5) As to most of the statements claimed to be false representations in the Burnham report, they are necessarily and obviously matter of *opinion* and, therefore, need not be considered. Mere opinion as to fact is not a false representation that it exists.

The conclusion to be drawn from the Burnham report, therefore, is that, *first*, it was not relied on, and its statements as to width of pay streak and amount and average richness of ore were not accepted by Egan, who made his own estimates, and, *second*, it was a *historical* and not a present representation, and, *third*, its statements afforded no ground for assuming that the mine had a greater than its apparent value at the time of Egan's examination, and furnished no data whatever for a definite answer to the question, "what would the mine have been worth some two years later, if "such statements—and such statements only—in the Burnham "report as were shown to be *incorrect at the time they were made*, "and not matter of *opinion* or admitted *hearsay* had been "accurate?"

(b) As to alleged misstatements made directly by Sigafus to

Egan, it is sufficient to quote the following from Egan's own testimony (italics ours):

"I did verify Mr. Sigafus's statements the best of my ability "and with the means at my disposal. That verification was before the "sale to Griffith. Mr. Sigafus *didn't make any statements that were* "*not true*, but he neglected to tell me that the second level north "was driven 80 feet further than apparent, and the second level "south 150 feet further than was apparent, and I don't believe now "the ore from that mine averaged $20 per ton since the working of "the mine, as he stated."

Rec., p. 103.

Sigafus positively denies the allegation that he stated that the ore averaged $20 per ton since the working of the mine (fol. 911), nor, if he did, is there any exact proof as to the actual average per ton since the working of the mine, or that the average was not $20 a ton, or that Sigafus did not believe it to have been $20 a ton. In any event, the statement affords no ground for any definite calculation as to the value of the mine at the time of sale.

There is nothing whatever charged to have been said by Sigafus which affords a basis for a comparison between the value of the mine and its value as represented.

(c) As to alleged fraudulent acts by Sigafus; *viz.:* (1), alleged acts of concealment. *(a)* As to the *south* end of the mine.

There was nothing which prevented Egan from proceeding beyond the winze, as defendant's witness positively testified he actually did, and there was nothing to indicate a different condition of the ground and vein in that direction, from that actually existing, which Egan could see for himself, and which was mentioned in the Burnham report, which he says he examined.

(b) As the *north* end of the mine:

Here there was a pile of drift at the end of the level. No misstatement was made to Egan as to whether the drift was against the breast of the level or whether the excavation was carried further or not, or, if carried further, how far it was carried. Sigafus made no statement on the subject, except his general statements giving about the length of the levels, which were not relied on, or intended to be relied on, by either party, because Egan made his own measurements, and which were substantially true because the true level ended there, the further excavation being a mere mislead off the vein, which was recovered at a point above. There is no evidence that

any statements of Sigafus as to the length or condition of the levels was knowingly false. The only statement made as to the débris at the north end of the lower level was that by Cheatham, the superintendent, for which Sigafus could not be held responsible, even if incorrect, unless made with his knowledge and consent and with knowledge on his part of its falsity. No such thing is proved or attempted to be proved. Moreover Cheatham did not purport to have any knowledge on the subject as he was absent and working in another mine when that part of the Good Hope mine was opened (fol. 230).

The fact, whatever it was, was immaterial and afforded no evidence of value. It was merely a temporary loss of the vein; the fact that the level stopped at the drift afforded no evidence, one way or the other, as to what was in the unexplored ground, and, therefore, afforded no criterion of apparent value, and the working of the new drift above, close to the same place, showed that exploration had been begun in another direction, which was sufficient evidence that the vein might have deflected.

(2) As to alleged tampering with the mill run:

It has been shown—

1. The true amount run through the mill was known to Egan, on his own calculation of the number of car loads to the ton.

2. That he falsified this return in his report.

3. That the actual average of ore to the ton shown by the run closely corresponded to the official returns which Egan adopted as the basis of his calculations, and precluded the idea of any increase in richness by additions of the metal, and had no effect on the average adopted by Egan, and, further,

4. There is absolutely no proof as to *what* increase of value was given to the run by such fraudulent act, even under the supposition (incredible in the light of the evidence) that such fraudulent increase had occurred.

The value of a gold mine depends, first, and before everything else, on the amount of gold it contains. This, so far as it can be estimated, is known in ordinary mining language as ore "in sight" and ore "in reserve," the two expressions meaning the same thing—viz., where three or four sides of a "block" are exposed, the amount of ore contained in the block supposing the ore continues through-

out its extent, and to remain of a uniform average richness (fols. 478, 479, 737, 747).

In this case, the only materiality of the alleged misrepresentations worth considering is their supposed materiality as affecting Egan's estimate of the amount of ore the mine contained. The mine was bought because Egan, a professional expert, gave it as his opinion, after a personal examination, that it contained so much ore of an estimated average richness of $17 a ton. That was essentially the only thing that induced the venture. Beyond that all was mere expectation or hope. An unsigned, undated report of a former examination nearly two years before as to amounts already taken out of the mine, or its condition at that time or earlier, were comparatively unimportant. Whatever inferences might be drawn from them were subject to modification by Egan's examination. That, and that alone, was relied on. Now, as the above summary of the testimony has shown, there were no alleged misrepresentations relied upon by Egan in forming his opinion as to the amount or richness of the ore in sight or the ore in reserve. He took its average richness from latest official returns admitted to be correct; he had the fullest opportunity to make his own measurements as to the length and breadth of the exposures of the boundaries of the vein forming the edges of the "blocks," the area of which formed his basis of calculation as to the amount of gold-bearing ore not exposed and buried in the earth. The alleged method of excavation, consisting in leaving the widest parts exposed on the top of the level, did not affect the exposure of the perpendicular cuts through the vein or its exposure on the bottom of the levels, and could not, as already pointed out, have affected, in any measurable degree, his calculation. But, when all is said, the only effect the supposed misleading appearance could have had, would have been to induce him to have made a *lower* estimate of the amount of gold contained in the unseen parts of the "blocks" or sections of the vein he measured. How much less? No one can say. But, even if they *could* say, the estimate would remain pure *opinion* still, and what Egan's *opinion* might have been is not an exact or definite measure of value. *Whatever* his opinion, the mine might turn out richer or poorer than he supposed. His "blocks," when explored, no matter what he predicted they might contain, might turn out to contain little or nothing, or might have nuggets or pockets of enormous richness.

The phrase "market value" was used as to the mine, but, from the nature of the case, there can, properly speaking, be no market

value for such a piece of property as a gold mine. Each mine stands by itself. There are neither enough sales nor a sufficient uniformity of value to create a standard, such as fixes the value of commodities bought and sold in the market.

Plaintiff's cousel was allowed, under defendant's objection and exception, to propose a hypothetical question to expert witnesses, based upon the plaintiff's claim as to the misrepresentations proved, supposing the plaintiff's evidence to be believed. That these questions were based largely upon false assumptions, and were unwarranted by the testimony, and beyond the limit of any allowable hypothesis, is the subject of discussion elsewhere in this brief, but beyond all this, no possible hypothesis, based on the testimony, could alter the nature of the evidence itself, or avoid the fact that in this case, the answer to the question: What would be the value of the mine, if the supposed misrepresentations were true? in its final analysis, can only be the barest conjecture. The review that has been made of the testimony, it is submitted, conclusively establishes this fact. It may be illustrated from the testimony of Olcott, the plaintiff's expert. He was asked to assume that the mine had the number of tons in reserve and the number of tons in sight which it was stated to have in the Burnham report, two years before the sale. He was asked to assume that that ore averaged $18 a ton gold, and that the cost of milling averaged so much, and was then asked what, in his opinion, the mine was worth. Deducting the cost of milling, he finds that, on the supposition in question, the ore would average eleven dollars a ton profit; and, multiplying that amount by the supposed number of tons present, he, by mere calculation, finds that the mine would figure up the precise sum of nine hundred and two thousand dollars ($902,000); or, assuming that all the ore would average $23.78 gold per ton, the value, by the same simple method of calculation, was stated to be $1,375,000. Now, assuming that it was true that at the date of the Burnham report the ore was averaging $18 a ton; and assuming thatthe assays prior to that time had shown an average of $23 per ton, whether the ore still buried in the mine, after two years working and which, at the time immediately preceding the sale, was running at an average of about $17 a ton, or a trifle below, would continue to show an average of $18 to $23, was purely conjecture. The assumption that the blocks estimated as ore in reserve and ore in sight two years before were solid blocks of ore, of an average uniform richness, and without barren ground, was also purely conjecture. Consequently,

the value of the mine, on the supposition presented to the witness, was necessarily a matter of conjecture, and of the highest degree of uncertainty. To leave it to a jury, upon such evidence, to find what the mine would have been worth, if it had been as represented, was practically to leave to the jury to find any amount they might arbitrarily fix, running from nothing up to a million of dollars. Such a rule, it is submitted, cannot be justified without a violation of the cardinal principle that damages in an action for deceit are limited to the direct consequences of the injury to the *loss* the plaintiff has suffered, and must be measured by evidence that permits of calculation based upon *reasonable certainty*, and not upon unrestrained and hazardous conjecture.

The language of this Court in Southern Development Co. vs. Silva (125 U. S., 248) is as follows:

"Besides, the quantity of ore 'in sight' in a mine, as that term "is understood among miners, is at best a mere matter of opinion. "It cannot be calculated with mathematical or even with approxi- "mate certainty. The opinions of expert miners, on a question of "this kind, might reasonable differ quite materially.

"In the case of *Tuck vs. Downing*, 76 Illinois, 71, 94, the Court "say: 'No man, however scientific he may be, could certainly state "'how a mine, with the most flattering outcrop or blow-out, will "'finally turn out. It is to be fully tested and worked by men of "'skill and judgment. Mines are not purchased and sold on a "'warranty, but on the prospect. "The sight" determines the "'purchase. If very flattering, a party is willing to pay largely "'for the chance. There is no other sensible or known mode of "'selling this kind of property. It is, in the nature of the thing, "'utterly speculative, and every one knows the business is of the "'most fluctuating and hazardous character. How many mines "'have not sustained the hopes created by their outcrop?' * * *

"125 U. S., 252.

It is submitted, therefore, that, in the trial below, the learned Court was in error, in permitting this evidence to go to the jury, against the defendant's objection; and in refusing the motion to dismiss, based upon the ground of incompetency of the proof offered as to damages, and the judgment should have been reversed, and a new trial ordered by the Circuit Court of Appeals upon the grounds set forth in the 10th, 19th, 20th, 21st, 23d, 26th, and 28th assignments of error (pp. 593 *et seq.*).

SECOND,

At the trial, the defendant's counsel requested the learned Jugde to charge as follows as to the rule of damages :

" If the jury find for the plaintiffs they can only find as damages " the direct pecuniary loss, if any, the plaintiffs suffered by reason of " the false and fraudulent representations and acts of the defendant. " and the value of the mine, if the same had been as represented, " affords no proper element of recovery. The value of the mine " when plaintiffs bought it must be applied in reducing or ex- " tinguishing the plaintiffs' loss " (fol. 1385),

which request was refused, and the jury was charged :

" The measure of damages in actions of this nature is the differ- " ence of the value of the property as it proved to be, and as it " would have been as represented."

to which exception was taken (fol. 1383). It will be observed that the request to charge was in substantially the language of this Court in the case of *Smith vs. Bolles.* The authorities in support of this rule have bean collected and commented upon in the brief already filed herein, when the case first came before this Court. It is not necessary to argue here the questions considered in that brief. However, a very few additional observations may be made. While it is true that there is a conflict of authorities upon the point, the weight of authority, both in England and in this country, supports the rule adopted by this Court in *Smith vs. Bolles*, and that rule is also the most consonant with principle on a close application of the rules of law. Where, in a contract between two parties, there has been a warranty, such as will support an action *ex contractu*, in which case the warranty must be definite and certain, so as to be capable of enforcement as a contract obligation, the measure of damage, in case of a sale, is clearly the difference between the thing sold, if it had been as warranted, and the thing actually received. If a buyer purchases a lot of iron upon a warranty that it is No. 1 iron, and it turns out to be No. 3 iron, and he elects to sue on his warranty, his damage is clearly the difference between No. 3 and No. 1 iron, because it arises *directly* from the breach of the *promise on which he sues.* It is a direct, immediate consequence of the breach, a damage arising from the very gist of his action ; but, if a party chose to sue for deceit, because, by false representations, fraud, covin and deceit, he has been induced to part with value, and has suffered direct pecuniary damage, he can recover that damage ; but to say that

the loss of his bargain, the loss of profits, the probable *gain* which he might have made by the bargain in which he was cheated, is a direct damage flowing from the *deceit*, is not, it is submitted, strictly coreect. If he recovers damages which put him back in the same position he would have occupied if he had never been cheated at all; he has recovered the whole direct consequences of the injury. Although, therefore, in some cases, the distinction between an action purely for deceit and one on contract, for a warranty, has been disregarded, so far as relates to the measure of damages, yet it would seem that the better and more logical opinion is that which, in case of deceit, puts the plaintiff back in his original position, with compensation for all loss actually incurred. And, at all events, in cases like the present, where there is no alleged representation, which could be held to amount to a warranty, and where the only inducements to the sale, based upon any misrepresentations of the defendant, or representations for which he could be held liable, were inducements which could only affect, not the intrinsic actual value, but merely the conjectural value of the property, certainly the rule as laid down in *Smith vs. Bolles* should prevail.

As the entire record is ordered up before the Court we beg leave to call attention to the following additional errors of the Trial Court to which exceptions were duly taken.

Specification of Errors.

FIRST.

That the Court erred in overruling each and every of the objections of the defendant, duly and seasonably taken, and allowing the following questions, and each of them, to be put to witnesses, examined on behalf of plaintiffs to be answered as follows:

1. By plaintiffs' witness Kingsbury:

"Q. At the time of said mill run did said Cheatham make any "inquiries of you concerning certain sacked ore in the mine? If "yea, state fully what he said in making said inquiries and what "you said? A. He did ask me in regard to some ore in sacks that "was in the stope in the first level near the second mainway north "of the main shaft. Cheatham asked me if it was good ore, and I "told him it was."

2. By plaintiffs' witness Kingsbury:

"Q. Do you know whether Cheatham saw the said con-
"centrates or sulphurets concerning which you have been testifying
"to? If yea, when did he see them, who was present when he saw
"them, and what, if anything, did you hear him say about it? A.
"Before there was any mill run made, a month or two, Cheatham
"asked me one day in the stope, at the same time pointing it out to
"me, if I had noticed it, and I told him I had; the remark was
"made by one of us, 'It looks as if it had been put there.' There
"was no one else present besides him and me."

3. By plaintiffs' witness Miller:

"Q. If said Cheatham gave you any instructions or orders, state
"fully what he said. A. He told me to put some ore that was
"sacked in the chute."

4. By plaintiffs' witness Cocking:

"Q. Did Cheatham give you any instructions as to what you
"should do during the mill run? If so, state what he said in giv-
"ing said instructions and what you said at the same time. A.
"When I went down in the morning he told me not to send up any-
"thing until he came down; when he came down he took me
"around and showed me what chute he wanted me to run out of;
"he told me to run out of all the chutes except one when Egan was
"down in the mine, and I done it."

5. By plaintiffs' witness Cocking:

"Q. If, at any time during said mill run, Cheatham had any talk
"with you about said account (meaning an account the witness had
"kept of carloads of ore run up), state fully what he said and what
"you said and all about it? A. Yes, sir; he did. He came down
"in the mine and wanted to know what in hell I was doing. I told
"him I was not doing anything but sending up ore and running the
"cars. He said I was sending up one car and marking down two;
"I told him I wasn't; then we had a little quarrel over it down
"there."

"Q. If Cheatham at any time did anything to your account that
"you kept on the tally-board of the carloads that were sent up,
"state fully what he did? A. Yes, sir; he did; he scratched off
"fifteen marks from my tally-board."

6. By plaintiffs' witness Cocking:

"Q. If said Cheatham, before Egan came to the mine and

"before the mill run was made, said anything about a purchaser "coming to examine the mine, state fully what he said, how long "before the said mill run that he said it, and where you and he "were when he said it? A. Yes, sir; he told us there was a party "coming here to see about buying the mine; that was one day at "noon, when we were coming up the shaft, about half-way up; it "was a few days before Egan came."

"Q. At the time referred to, if he gave you any order or instruc- "tions as to the workings in the stopes or preparing the stopes for "examination, state fully what he said? A. Yes, sir; he told us "this party was coming, and to get our places fixed up nice, and we "done it."

7. By plaintiffs' witness Whitten:

"Q. Did you have any conversation with Cheatham during the "mill run about your account (meaning the tally of cars) and the "number of cars of ore that came up? If so, state it. A. He said "my tally was not right, that it didn't tally with the boys below."

"Q. If, during the mill run, Cheatham changed any of your "tally-boards, state what change he made? A. There was a change "made by Mr. Cheatham; he said I had too many cars; I don't "remember how many he took off."

8. By plaintiffs' witness Whitten:

"Q. What instructions, if any, did Cheatham give "you during the mill run as to what you should do? "State fully what he said and what you said. A. Yes, "sir; he told me to keep the skip cleaned out. Mr. "Sigafus told me, when Cheatham was present, to keep "the ore cleaned up on the platform where it had spilled off "the car."

These objections and exceptions were taken at folios 129, 135, 153, 157-58, 163, 164-65, 178-79-80.

The evidence was objected to because there was no evidence, direct or circumstantial, that Cheatham was the agent of defendant to make representations, or do the acts testified to, or that defendant knew of or knowingly took advantage of such representation, or acts.

SECOND.

That the Court erred in overruling the objection of the defendant, duly and seasonably taken, and allowed the following question put to James A. Kingsbury, a witness for plaintiff, to be answered:

"Q. Did you hear Cheatham say anything to any other person, "or give any orders to any other person, about said ore that you had "sorted? If yea, state what he said to the person about it, and "who that person was?

"A. I heard Cheatham tell Bev Boren to sort it as he took it "out into the car, that is, the ore that I broke, and he did "sort it, close to a carload."

This objection was taken at folios 132-33.

The evidence was objected to for the reasons stated in the first assignment of error, and also for the reason that the testimony was immaterial, and because Eagan's report of his examination stated that in his test he took the quartz alone and as little outside the vein filling as possible (fol. 1407).

THIRD.

That the Court erred in overruling the objection of said defendant, duly and seasonably taken, and allowing the following question, put to James B. Doran, a witness for the plaintiffs, to be answered:

"Q. Are you able to state, with substantial accuracy, the aver- "age richness of the ore in the Good Hope Mine in November, "1893?

"A. Yes, sir. The value was $8 per ton in free gold, and a "small value besides in sulphurets." (He called it $1.50 per ton.)

This objection was taken at folios 80 and 81.

This evidence was objected to as incompetent and calling for an opinion, because the witness Doran had not been qualified to testify as an expert or otherwise, in regard to the richness of the ore in November, 1893.

FOURTH.

That the Court erred in overruling the objection of said defendant, duly and seasonably taken, and allowing the following question, put to James A. Kingsbury, a witness for plaintiff, to be answered:

"Q. In your opinion, what was the value per ton of said sacked "ore? A. It is pretty hard to put a value on it. In my opinion it would run $20 per ton or more."

This objection was taken at folio 131.

This evidence was objected to as incompetent, because no sufficient evidence was introduced that Kingsbury was competent to testify to the value of this ore.

The fifth, sixth, seventh and eighth assignments of error are abandoned.

NINTH.

That the Court erred in overruling the objection of said defendant, duly and seasonably taken, and in allowing the question put to John M. S. Egan, a witness for plaintiff, to be answered:

"Q. From the statements to you of Sigafus and Cheatham, to "which you have testified, and from the mill run as made, and from "the appearance of the mine and drifts on the second level, closed "up as you have testified, did you, or did you not, conclude "that the statements of the Burnham report were, or were not, "accurate?

"A. I concluded that in the main details the statements in the "Burnham report were accurate."

This objection was taken at folio 280.

This evidence was objected to as incompetent, immaterial and irrelevant, the grounds being, so far as Cheatham was concerned, substantially as stated under the first assignment of error.

TENTH.

That the Court erred in overruling the objections of said Sigafus, defendant, duly and seasonably taken, and allowing the following questions, and each of them, put to John M. S. Egan, a witness for plaintiff, to be answered.

"Q. Assuming that the ore body of the Good Hope Mine had "an average value of at least $17 per ton, and that the average "width of the vein was 24 inches, that the length of the vein de-"scribed by the workings was 950 feet, that the workings of the "mine consisted of the main shaft 416 feet deep, and the south "shaft 391 feet deep, the south shaft being 250 feet distant from "the main shaft, with the drift in the first level at a depth of 250

" feet from the surface—950 feet long—with the opening of from 4 " to 5 feet wide, 5½ to 6½ feet in height, with the drift in the second " level 350 feet below the surface—950 feet in length, with the " opening of the same size, this drift in the second level running " beneath the first for the entire length, and assuming that there " was nothing at the end of the drift to indicate that the vein " pinched out or disappeared, what, in your opinion, would have " been the fair market value of this property ?

" A. From $700,000 to $1,000,000.

" Q. Assuming the same conditions, with these modifications, " that the average value of the ore was $10 per ton ; that the aver- " age width of the vein was eighteen inches, and that the conditions " on the apparent ends of the drifts on the second level were such " as you subsequently found them and have heretofore stated in this " deposition, what, in your judgment, was the fair market value of " the property ? A. About $50,000."

These objections were taken at folios 277 and 278.

This evidence was objected to as incompetent, irrelevant and immaterial. The grounds of the objection being that there was no evidence making the material representations assumed in the first question chargeable to the defendants, or as to alleged facts included in the first question—to wit, that the average width of the vein was 24 inches, and the length of the vein described by the workings was 950 feet ; that the openings in the mine along the levels were from four to five feet wide, and from five and one-half to six and one-half feet in height ; and that there was nothing whatever at the end of the drift, meaning the drift in the second level, to indicate that the vein pinched out or disappeared, or that the vein did pinch out or disappear ; and also that such evidence is not competent to prove any basis for measure of damages.

The eleventh assignment of error is abandoned.

TWELFTH.

That the Court erred in overruling the objection of said defendant, duly and seasonably taken, and in receiving in evidence and allowing to be read to the jury Plaintiffs' Exhibit 2, the subscription paper of plaintiffs and associates, dated December 18, 1893, to wit, the contents of the paper and the first four names subscribed: John M. S. Egan, Dudley Porter, John L. Hobson and Charles W. Morse.

This objection was taken at folio 366.

This paper was objected to if it be introduced as evidence of liability to anybody except the individual plaintiffs in the case and as immaterial; the grounds of the objection being, first, that the paper by its terms being upon condition that $175,000 for payment January 1, 1894, be fully subscribed (fol. 1492), and no proof of such subscription having been given within the time limited in the paper or before the date of the purchase by Porter, Hobson and Morse, the paper was immaterial; second, that it was a subscription to Dudley Porter alone, and not to Porter, Hobson and Morse (fol. 1489), and there was no proof that at the time of making the purchase themselves the subscription paper to Porter as trustee was filed, so that in any way they could have represented the subscribers to it; third, that there was no evidence offered to show liability to any one but the individual plaintiffs, none of the subscribers having testified to being deceived, and there being no evidence that the plaintiffs were trustees to make an investment for the associates, or for anything else than to disburse moneys for the associates in payment for property which they, said associates, had themselves decided to purchase.

THIRTEENTH.

That the Court erred in overruling the objection of said Sigafus, defendant, duly and seasonably taken, and in receiving in evidence and allowing to be read to the jury (Plaintiffs' Exhibit 2) the subscription paper of plaintiffs and associates and all the signatures thereon. "Know all men by these presents: That we whose names "are hereto affixed do severally and respectively agree with Dudley "Porter, of Haverhill, in the county of Essex and Commonwealth "of Massachusetts, that we will severally and respectively pay to "the said Porter, on the first day of January, 1894 (or as soon "thereafter as he may require), the sums of money written opposite "our several and respective names, amounting to the sum of one "hundred and seventy-five thousand dollars ($175,000), one hun-"dred and fifty thousand dollars ($150,000) of which is to be ap-"plied as the first payment for the purchase of the Good Hope "Consolidated Gold Mining property in California, being the same "described in plan submitted by J. M. S. Egan, and consisting of "two certain mining claims known as the 'Good Hope" and 'San "'Jacinto' and the 'Annex' mining locations, all being located in

" the Pinacate mining district, County of Riverside and State of
" California, together with all the mills, boilers, engines, silver
" plates and mining and milling equipments, car tracks, etc., on or
" appurtenant to or used in connection with the aforesaid property;
" and the remaining twenty-five thousand dollars ($25,000) is to be
" expended in the erection of a twenty stamp mill and such further
" development of the property as may be deemed necessary.
" The purchase price for said property is four hundred thou-
" sand dollars ($400,000), and the balance of two hundred and fifty thousand dollars ($250,000) is to be paid as follows: One hundred thousand dollars ($100,000) on the 1st day of July, 1894, and one hundred and fifty thousand dollars ($150,000) on the first day of January, 1895; said payments of July first, 1894, and January 1st, 1895, to be secured by the obligation of the corporation formed, or to be formed, for the purpose of owning and mining this property, and by a first mortgage upon said property, but twenty-five thousand dollars ($25,000) of said payment of January 1st, 1895, shall be made by William H. Griffith, of Denver, Colorado, and in consideration thereof the said Griffith shall be entitled to one-eighth interest in and to said mining property.

This subscription is made upon the condition that one hundred and seventy-five thousand dollars ($175,000) for the payment of January 1st, 1894, be fully subscribed, and that we do not hereby bind ourselves to pay the whole or any part of said payments of July 1, 1894, and January 1, 1895, excepting that said Griffith shall make said payment of twenty-five thousand dollars ($25,000).

And said Porter does hereby agree with the remaining parties to this agreement that the amount written opposite his name will be applied toward said first payment upon the terms and conditions herein expressed with reference to the other subscriptions.

It is hereby understood and agreed, by and between all the parties hereto, that, in case a corporation be organized for the purpose of mining and owning said property, and the said property is conveyed to said corporation, said Griffith shall be entitled to receive one-eighth interest in and to the capital stock of said corporation in lieu of one-eighth interest in said property as herein provided for.

The subscribers further constitute and appoint Charles W. Morse and John M. S. Eagan, their agents and attorneys, to make said first payment of one hundred and fifty thousand dollars ($150,000), upon evidence satisfactory to them of the title to said property, and upon

terms which they deem proper to secure proper conveyance of said property to or for the benefit of the subscribers, and to form or procure to be formed a corporation to own and mine said property, and to carry into effect the provision that said Griffith shall have one-eighth of said property, or of the stock of said corporation as herein provided, and to do any and all things necessary and proper to vest the title of the remaining seven-eighths of said property, or to the remaining seven-eighths of stock of the corporation formed or to be formed as aforesaid, in the subscribers respectively, in the respective proportions of their several and respective subscriptions.

Witness our hands and common seals this eighteenth day of December, A. D. 1893.

[L. S.]

John M. S. Egan, $10,000, ten thousand dollars.
Charles W. Morse, $15,000, fifteen thousand dollars.
Dudley Porter, $15,000, fifteen thousand dollars.
John E. Hobson, $15,000, fifteen thousand dollars.
Elbridge G. Wood, $15,000, fifteen thousand dollars.
Boyd B. Jones, $10,000, ten thousand dollars.
Charles E. Wiggin, $5,000, five thousand dollars.
D. T. Kennedy, $5,000, five thousand dollars.
Thomas S. Ruddock, $5,000, five thousand dollars.
Austin E. Ruddock, $5,000, five thousand dollars.
George H. Carleton, $5,000, five thousand dollars.
Moody & Bartlett, $5,000, five thousand dollars.
H. L. Doyle, $3,000, three thousand dollars.
J. Otis Wardwell, $3,000, three thousand dollars.
George H. Carleton, $5,000, five thousand dollars.
F. E. Hutchinson, $5,000, five thousand dollars.
John J. Winn, $2,500, twenty-five hundred dollars.
N. B. Newton, five thousand dollars.
Geo. D. Morse, $1,000, one thousand dollars.
Wm. H. Floyd, $5,000, five thousand dollars.
Enoch H. Howes, $2,000, two thousand dollars.
Mellen A. Pingree, $2,000, two thousand dollars.
George C. Howe, $1,000, one thousand dollars.
B. B. Jones, agt., $1,000, one thousand dollars.
Charles H. Poor, $1,000, one thousand dollars.
Kelly Bros., $5,000, five thousand dollars.
E. B. George, $1,000, one thousand dollars.

Geo. W. Gilbert, $2,500, twenty-five hundred dollars.
James F. West, $1,000, one thousand dollars.
Howard H. Gage, $1,000, one thousand dollars.
Maurice D. Clarke, $3,000, three thousand dollars.
Thomas E. Burnham, $1,000, one thousand dollars.
William H. Moody, $1,000, one thousand dollars.
H. L. Dole, $2,000, two thousand dollars.
C. W. Morse, by B. B. Jones, $3,000, three thousand dollars.
" C. Howard Poor by B. B. Jones, $2,000, two thousand dollars."
" Byd. B. Jones, trustee, $1,000, one thousand dollars."
This objection was taken at folios 494-95.

The paper was objected to as incompetent and immaterial, on the ground that the plaintiffs cannot in this action recover in a representative capacity for an alleged deceit practiced upon these other subscribers.

The paper was admitted by the Court, after the statement by plaintiffs' counsel : " As the point is taken that there can be no re-
" covery for the other subscribers, now we offer to prove the fact of
" their subscriptions and the amount of their subscriptions, and then
" we will put in other evidence " (fol. 495). This promise of other evidence as to the deceit of the associates or any fact justifying a recovery on their account, was never fulfilled.

FOURTEENTH.

That the Court erred in overruling the objection of defendant duly and seasonably taken, and receiving in evidence and allowing to be read to the jury the following letter, Plaintiff's Exhibit 15 :

" GOOD HOPE MINE, Nov. 23, 1893.

" C. W. MORSE, ESQ.:

" MY DEAR SIR—I am now having 20 tons of ore that I have out
" from various portions of the mine run through the little trap they
" have, and shall get through to-morrow night. I have measured
" the ore bodies opened up ready for stoping twice, as my first fig-
" ures paralyzed me ; but there is actually in sight nearly a million
" dollars of gold, but ready to mill, $797,000 worth. The gold is
" coarse, and, just as I told you in Denver, the mine seems made to
" order. You would have to be here on the ground to appreciate
" the situation, and, unless you knew *all* the circumstances as I do,
" you would deem it incredible. All the mine needs is a 40-ton mill

"instead of a 6-ton. Even with this, it has paid from the grass "roots, and paid a handsome dividend every month. Now, I tele- "graphed you, as the matter must be pushed through as rapidly as "possible. No stand-off nor talk will go with Sigafus—he wants to "get away from here and get his daughter and childred East. The "son-in-law is in a Keeley institute at Los Gates.

"I hope to hear from you on my return to Denver on the 30th. "The price is too low for the property, and we must get a big slice. "It can be made worth $2,000,000 in two years. I never saw such "a proposition for the money.

"With best regards.

"Yours sincerely,

"JOHN M. S. EGAN."

This objection was taken at folio 395.

This paper, a letter written from Egan to Morse during Egan's examination of the mine—there being no evidence whatever that defendant knew of or authorized it, or that any one but Morse ever saw it, or relied upon it; but the contrary, first offered in evidence after Egan's examination had been completed and he had died—was objected to as not binding upon the defendant, and as immaterial, irrelevant and incompetent.

FIFTEENTH.

The Court erred in overruling the objection of said defendant duly and seasonably taken, and in receiving in evidence and allowing to be read to the jury the following letter of John M. S. Egan to one James H. Platt, dated at Good Hope Mine, November 21, 1893, in substance as follows:

"My opinion in the report is now fully confirmed by my examina- "tion, now in its sixth day. It is the mine that we have been look- "ing for for years. It is a mine that can be worth a cool million, "or two of them, in a year, by vigorous and proper management, "and pay big from the word go. The circumstances narrated by "Mr. Griffith as causing the sale of the property are absolutely "true: An only daughter, a mine purchased for a worthless son-in- "law in a Keeley institute, practically incurable, and the old man's "other big properties in Mexico shut down so he cannot attend to "them, and cannot, or will not, leave the mine to go to the dogs. "The purchase price of the mine is in evidence in one stope alone.

" The gold is free and coarse. The mill is a very rattle-trap, runs " six tons a day, yet clears over a hundred dollars a day. It is a " bonanza, absolutely. There is good reason for his selling. It is " an opportunity that comes but once in a lifetime. We must meet " somewhere to consult and arrange for a plan of campaign, and if " not convenient for you to come to Denver with Mr. Morse, Griffith " and I will go on East and meet you, but the game is worth the " candle, well worth it."

The objection is taken at folio 396.

This paper (Plaintiffs' Ex. 18), printed at folios 1559-63, a letter written by Egan to one James H. Platt, a stranger to both parties, was objected to as not binding on defendant and as immaterial, irrelevant and incompetent. The other circumstances as to it are similar to those detailed in the fourteenth specification of error.

SIXTEENTH.

That the Court erred in overruling objections in each case of defendant, duly and seasonably taken, in receiving in evidence and allowing to be read to the jury, letter from John M. S. Egan to Charles W. Morse, dated Perris, Cala., November 18th, 1893, Plaintiffs' Exhibit No. 13; letter from John M. S. Egan to C. A. Roberts, dated Good Hope Mine, November 19th, 1893, Plaintiffs' Exhibit No. 14; letter from John M. S. Egan to Charles W. Morse, dated Good Hope Mine, Plaintiffs' Exhibit No. 16; two telegrams from John M. S. Egan to Charles W. Morse, dated Denver, Col., November 29th, 1893, Plaintiffs' Exhibit No. 17.

These objections were each and every of them taken at folio No. 395. These papers printed in full at folios Nos. 1546-51 and Nos. 1555-58, and being letters and telegrams written from Egan to Morse and Roberts, a stranger to the transactions, during Egan's examination of the mine, there being no evidence whatever that defendant knew of, or authorized them, or any of them, or that any one but Morse ever saw or relied upon them or any of them, but, on the contrary, and being first offered in evidence after Egan's examination in this case had been completed and he had died, were objected to as not binding upon the defendant and as immaterial, irrelevant and incompetent.

SEVENTEENTH.

That the Court erred in overruling the objections of the defendant, duly and seasonably taken, and in allowing the following questions, put to Elbridge G. Wood, a witness for plaintiffs, to be answered:

"Q. What papers were submitted to the investors so far as you "know?

"A. These two reports.

"Q. And where you did not show the identical papers to the "subscribers, did you make any statement to them, and, if so, what "as to the contents of the papers?

"A. I could not state any definite statement made to them "from my recollection at the present time."

These objections were taken at folios 500 and 502.

This evidence was objected to, first, as not brought home to the defendant and as not binding on defendant, the grounds being that there was no evidence that Wood made any statement with the knowledge of defendant or his authorization, or that he was defendant's agent for any purpose; and, second, that this evidence was incompetent upon the question as to whether or not any of the subscribers relied upon these statements or were deceived.

The eighteenth assignment of error is abandoned.

NINETEENTH.

That the Court erred in overruling the objections in each instance of said Sigafus, defendant, duly and seasonably taken, and in allowing the following questions put to Eben E. Olcott, a witness for plaintiff, to be answered:

"Q. Assuming that the Good Hope Mine was opened up by "two levels, each having a length of 950 feet, level No. 1 being 250 "feet below the surface, and level No. 2 being 100 feet below No. 1, "and on the same vein, each level being in the vein its entire "length, and each level being connected with a main shaft which "had a depth of 416 feet, and was in the vein at the bottom; and "assuming that the ore body in the mine was a continuous one the "entire length of said levels, with an average width of 24 inches, "and with an average value of at least $18 a ton, free-milling gold, "and that there was of said ore 44,733 tons in reserve, above the "second level, and 37,333 in sight below the second level, and that

" the entire cost of mining and milling said ore, including all " charges of whatsoever nature, would not exceed $7 a ton, that in " a twelve months' mill run 2,434 tons of ore had been mined and " milled as mined from said mine, and had produced in bullion " $57,897.78, being an average of $23.78 in free gold per ton, at a " cost of $15,500; and assuming further that the Good Hope " mining claims were 4,000 feet in continuous length, and in other " respects were not developed, and that the main shaft was " in ore at its lowest depth; that the levels were in ore at their " ends and throughout their length, and that there was nothing " seen, visible, that afforded any reason for believing that the ore " body did not continue in length and depth for an indefinite " distance, what, in your opinion, was the fair market value on the " first of January, 1894, of such a mine?

" A. From $902,000 to $1,375,000, based upon the two defferent " sets of values given in the report and in your question.

" Q. If any ore body 24 inches wide contains an ore reserve of " 44,733 tons, how much would an ore body 18 inches wide, but of " the same dimensions in other respects contain?

" A. Three-quarters as much, as eighteen is three-quarters of " twenty-four, and that would be 33,000."

These objections were taken at folios 723-726-7.

This evidence was objected to as as incompetent, immaterial and irrelevant, on the ground that it calls for the opinion of an expert on matters not included in any statement of false representations against the defendant; that it assumes as facts pure matters of opinion, and that it assumes facts that have not been proved in some respects, and as to which there is no evidence, the grounds of the objection being that there was no evidence as to any representations chargeable to the defendant, or as to alleged material features included in the assumption, to wit:

Each level being in the vein its entire length; the main shaft was in the vein at the bottom; the ore body in the mine was a continuous one the entire length of said levels; with an average width of 24 inches and with an average value of at least $18 a ton in free-milling gold, that there was of said ore 44,733 tons in reserve above the second level, and 37,333 tons in sight below the second level, and that the entire cost of mining and milling said ore, including all charges of whatsoever nature, would not exceed $7 a ton; that in twelve months' mill run, 2,434 tons of ore had been mined and milled as mined from said mine, and had pro-

duced in bullion $57,897.78, being an average of $23.78 in free gold per ton, at a cost of $15,500; that the Good Hope mining claims were in other respects (than as stated in the question) undeveloped; that the levels were in ore at their ends and throughout their entire length, and that there was nothing seen visible that afforded any reason for believing that the ore body did not continue in length and depth for an indefinite dstance, and also that said assumption called for an estimate upon alleged statements of pure matters of opinion, with which the defendant cannot be charged, to wit:

That the ore body in the mine was a continuous one the entire length of said levels, with an average width of 24 inches and with an average value of at least $18, and contained free-milling gold, and that there was of said ore 44,733 tons in reserve above the second level, and 37,333 tons in sight below the second level, and that the entire cost of mining and milling said ore, including all charges of whatsoever nature, would not exceed $7 a ton, and also that such evidence is incompetent to prove any basis for measure of damages.

TWENTIETH.

That the Court erred in overruling the objections, in each instance, of said defendant, duly and seasonably taken, and in allowing the following questions, put to Eben E. Olcott, a witness for plaintiffs, to be answered:

"Q. Assuming that the Good Hope Mine was opened up by "two levels, each 950 feet in length, level No. 1 being 250 feet below "the surface, and level No. 2 being 100 below level No. 1, each being "in the same ore body and connected with a main shaft 416 feet "deep; and assuming that this ore had an average width of 18 "inches; that it was not a continuous ore body, but pinched in and "out in different places, so that one-fifth of the ground between the "surface and the second level was barren ground; that beyond the "north end of the apparent second level, the level had been drifted "not less than 80 feet in barren ground, the vein lost and noth-"ing to indicate it extended beyond said north end, and "thereupon this opening into the barren ground had been "closed up and concealed from view; and assuming also that beyond "the south end of the apparent second level, that level, for not less "than 150 feet, had been driven in barren ground, the vein lost and "no indication that it extended further than said south end, and that

" this extension of the south end had been closed up and concealed " from view ; and assuming that the ore in reserve in said mine did " not exceed 33,550 tons, without deducting any allowance for said " barren ground ; and assuming further that the ore in sight did not " exceed in quantity 27,999 tons ; and assuming also that the average " value of the ore mined did not exceed $11 a ton ; that the cost of " mining and milling it was not less than $11 per ton, and that there " was no reliable record of what it had done in the past, and that the " mining claims, of which this mine was a part, were 4,000 feet in " continuous length, and were developed only as herein stated ; on " these assumptions what, in your opinion, was the fair market value " of the property, on the same date, January 1, 1894, including " the mine ?

" A. I should say that such a mine was, commercially speaking, " valueless, on the basis that it cost as much to extract the gold as " the total product of the gold in the ore."

These objections were taken at folios 730-31.

This evidence was objected to as incompetent, immaterial and irrelevant, on the ground that it calls for the opinion of an expert upon many matters which are not included in any statement of false representations against the defendant, that it assumes as facts pure matters of opinion, and that it assumes facts that have not been proved in some respects, and as to which there is no evidence to prove, the grounds of the objection being that there was no evidence as to alleged facts included in that assumption, as follows :

That beyond the north end of the apparent second level the level had been drifted not less than eighty feet in barren ground, the vein lost, and nothing to indicate its extending beyond the north end ; that beyond the south end of the apparent second level that level for not less than 150 feet had been driven in barren ground, the vein lost, and no indication that it extended further than said south end.

TWENTY-FIRST.

That the Court erred in overruling the motion of said Sigafus, defendant, duly and seasonably made at the close of plaintiffs' case to dismiss the complaint, said motion being as follows :

" MR. WETMORE : If your Honor please, I will state my motion " to dismiss. I move to dismiss the complaint on the ground that

"the cause of action set forth in it has not been proved. The cause "of action set forth in the complaint is, in substance, that the de- "fendants, through one William H. Griffith, entered into negotiations "with the plaintiffs for a sale to them of certain lands and mines, "mining claims and appurtenances, and that prior to the 28th of "December the plaintiffs entered into negotiations for the purchase "of said lands, and the defendant falsely and fraudulently repre- "sented to the plaintiffs the misrepresentations which have been "stated by counsel for the plaintiffs in his opening, and did to the "plaintiffs the fraudulent acts which are complained of.

"I move to dismiss the complaint upon the ground that this "cause of action has not been sustained.

"FIRST. Because there is no proof sufficient to go to the jury "that Mr. Griffith was in any way the agent of the defendant for "the purpose of making the sale, but that it clearly appears that "the relation was that of vendor and vendee.

"SECOND. That the plaintiff's sole contract, which was under "seal, was with Griffith.

"THIRD. That at the time of Colonel Egan's visit to the "mine there was no relation existing or intended between "the plaintiffs Porter and Hobson and the defendant "Sigafus. There is no evidence that at that time the plaintiffs, or either of them, had ever heard of Sigafus or of the Good Hope Mine.

FOURTH. That there is no evidence sufficient to go to the jury that the document which has been called the Burnham report was the one to which Mr. Sigafus referred, and to which Col. Egan referred, both intending the same thing. Any document of that name that has appeared in the case in their relations has not been identified.

FIFTH. That there was no relation between the plaintiff Morse and Col. Egan at the time of Egan's examination of the mine that would enable Morse, any more than the other plaintiffs, to hold the defendant liable for the statements made to Egan.

SIXTH. That there is no evidence that the plaintiffs in this case as set forth in the complaint, relied in any manner upon the statements which were made by Mr. Sigafus.

And I move to dismiss; first, as against the plaintiffs Porter and Hobson; secondly, as against the plaintiff Morse; and thirdly, for the reasons already stated, against the plaintiffs not named, whom these plaintiffs claim to represent."

This motion wes made by defendant and overruled over the exception of defendant at folios 752-756.

The twenty-second assignment of error is abandoned.

TWENTY-THIRD.

That the Court erred in denying the motion of said Sigafus, defendant, duly and seasonably made, to strike out the testimony of plaintiff's witness Eben E. Olcott. The full substance of this testimony appears above in assignments nineteenth and twentieth, and the following summary:

" The $902,000 and $1,375,000 were based upon two different " sets of values given in the report and in the first by hypothet- " ical question; one, a positive statement, is that the ore is worth " at least $18 per ton, free milling gold, and that the value is taken " in the calculations that are made on the various blocks of ore, " estimated in reserve and in sight, on that basis, $18 a ton and $7 " expenses, and on an amount of 82,000 tons which are estimated, " 44,000 in one case and 37,000 in the other, it leaves a net profit of " $11 per ton, or 11 times 82,000 equals $902,000. That is entirely " outside of the value in the future. The other value, leading up " to $1,375,000, is based on the result of a mill run, giving the value " of the actual product as $23.78 per ton, and the net of that would " be $16.78, and 82,000 times this would be $1,375,000.

" There is no better way of determining the value and quantity " of an ore reserve than by mining and milling it. It can be better " determined by a year's mill run with one's own men than by a " three days' run with employees of seller.

" I arrived at this estimate by multiplying the number of tons of " estimated ore in reserve and estimated ore in sight by the esti- " mated value of free milling gold in each, and subtracting the num- " ber of tons multiplied by the cost of extracting. It would take " about four years to mill 80,000 tons. I do not estimate ore an " inch further down than the lowest level nor an inch further than " the ends of the levels; in making a correct estimate ore below " the bottom of the lower level should be thrown out. I am not talk- " ing about a correct estimate.

"When I say that mines have been sold on the basis of ore in "sight, I mean the correct practice as to ore in sight. Nothing is "figured unless you can get to the four sides of it. If the stulling "and lagging prevents examination of the roofs of the levels I do "not figure that, as there would be no stulls there if there was "ore. In case an expert did not break through the timbers "and examine the roof of the tunnel he should not figure it as ore "in reserve or in sight."

This motion was made by defendant, and overruled over the exception of defendant, at folio 1349, the grounds of the motion being that the testimony affords no criterion to go to the jury, being based upon assumed misrepresentations of facts, as to which representations there was no proof, and upon assumed facts, as to which there was no proof and being based upon an erroneous theory, as to the measure of damages, all of which objections were taken first at the giving of the testimony, and the further ground that upon the witness' own statement, in answer to the hypothetical questions put to him, the data would not permit of an accurate answer.

TWENTY-FOURTH.

That the Court erred in denying the motion of said defendant, duly and seasonably taken at the close of the testimony, to dismiss the complaint, which motion was as follows:

"MR. WETMORE: Also to save my rights I move now, at the "conclusion of the evidence, to dismiss the complaint, upon the "separate grounds already stated, and each and every of them, to wit:

"1. That the cause of action set forth in the complaint has not "been proved in favor of each or either or any of the plaintiffs.

"2. That there is no proof, sufficient to go to the jury, that Mr. "Griffith was in any way the agent of the defendant for the purpose "of making the sale, but that it clearly appears that the relation "was that of vendor and vendee; that the plaintiffs' sole contract, "which was under seal, was with Griffith.

"3. That at the time of Col. Egan's visit to the mine there was "no relation existing or intended between the plaintiffs Porter, "Hobson and Morse and the defendant Sigafus; that there is no "evidence that at that time the plaintiffs, or either of them, had "ever heard of Sigafus or of the Good Hope Mine.

" 4. That there is no evidence, sufficient to go to the jury, that " the document which has been called the 'Burnham report' was " the one to which Mr. Sigafus referred, and to which Col. Egan " referred, both intending the same thing. Any document of that " name that has appeared in the case, in their relations, has not " been identified; that there was no relation between the plaintiff " Morse and Col. Egan at the time of Egan's examination of the " mine that would enable Morse, any more than the other plaintiffs, " to hold the defendant liable for the statements made to Egan.

" 5. That there is no evidence that the plaintiffs in this case, or " each or any of them, as set forth in the complaint, relied in any " manner upon the statements which were made by Mr. Sigafus; " that the motion to dismiss is (1) against the plaintiff Porter & " Hobson, and (2) against the plaintiff Morse, and (3) for the reasons " already stated against the plaintiffs and each of them not named, " whom these plaintiffs claim to represent."

This motion was made by defendant and overruled over the exception of defendant at folios 1350–54.

There was no evidence that Sigafus authorized Egan or Griffith to use the Burnham report for the purpose of influencing prospective purchasers, or that they relied on its except as endorsed by Egan.

TWENTY-SIXTH.

That the Court erred in charging the jury against the objection of said Sigafus, defendant, duly and seasonably taken, as to measure of damages, as follows: "The measure of damages in actions of this nature is the difference of the value of the property as it proved to be and as it would have been, as represented."

TWENTY-SEVENTH.

That the Court erred in refusing to charge the said defendant's eighth request to charge, duly and seasonably made, which was as follows:

" The damages in this case must be limited to those suffered by the plaintiffs in this action, and cannot include damages to other subscribers to the stockholders' agreement, not proved to have invested on the faith of Egan's endorsement of the Burnham report; no damages can be recovered, except for those individual plaintiffs."

TWENTY-EIGHTH.

That the Court erred in refusing to charge the said defendant's ninth request to charge, duly and seasonably made, which request was as follows :

"If the jury find for the plaintiffs they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of the defendant, and the value of the mine, if the same had been as represented, affords no proper element of recovery. The value of the mine when plaintiff's bought it must be applied in reducing or extinguishing the plaintiffs' loss," and charged upon the question of the measure of damages instead, as stated in assignment number twenty-sixth above.

These further assignments and specifications of error naturally group themselves under four heads :

1. Errors in the admission of testimony of experts as to value, based upon improper assumptions.

2. Errors in admitting evidence to charge the defendant with damages to others than the plaintiffs personally.

3. Error in denying the motion to dismiss the complaint on the ground that plaintiffs were not deceived by Singus, but by Egan.

4. Error in admitting evidence as to the acts, statements and declarations of Cheatham.

The Court erred in admitting the testimony of experts as to the value of the property as it was and as it would have been if as represented, based upon assumptions material to the estimate, as to which there was no evidence whatever, and assumptions which assumed as facts what were purely matters of opinion, and based upon incomplete assumptions.

Assignments and specifications of error Nos. 10, 19, 20 and 23 :

These errors occurred in the admission of testimony of two witnesses—to wit, OLCOTT AND EGAN.

The objection to the testimony of Olcott was taken both at the time (fols. 723, 731) and by a motion to strike out his testimony at folio 1430.

The questions objected to at the time were, *first*, a question based upon assumptions of material false representations claimed to have been proved as to what was the alleged market value of the mine on January 1, 1894, if it had been as represented; and the *second*, a question based upon assumptions of material facts claimed to have been proved as to what was the said value of the mine on the same date, as it actually existed.

These questions were objected to as incompetent, immaterial and irrelevant, on the ground that each called for the opinion of an expert upon many matters which were not included in any of the claims of false representations against the defendants; that each was based on assuming as facts pure matters of opinion; and that each assumed certain supposed facts which had not been proved, and as to which there was no evidence (fols. 723–31).

And the motion to strike out the testimony of Olcott (fol. 1349) was on the ground that it afforded no criterion to go to the jury, and that upon his own statement, in answer to the hypothetical question put to him, the data would not admit of an accurate answer.

THE FIRST QUESTION AND ANSWER OBJECTED TO IS AS FOLLOWS:

"Assuming that the Good Hope Mine was opened up by two "levels, each having a length of 950 feet, level No. 1 being 250 feet "below the surface, and level No. 2 being 100 feet below No. 1 and "on the same vein, each level being in the vein its entire length, and "each level being connected with a main shaft, which had a depth "of 416 feet, and was in the vein at the bottom; and, assuming "that the ore body in the mine was a continuous one, the entire "length of said levels, with an average width of 24 inches, and "with an average value of at least $18 a ton free milling gold, and "that there was of said ore 44,733 tons in reserve above the second "level, and 37,333 tons in sight below the second level, and that "the entire cost of mining and milling said ore, including all "charges of whatsoever nature, would not exceed $7 a ton, that in "a twelve months' mill run 2,434 tons of ore had been mined and "milled as mined from said mine, and had produced in bullion $57,- "879.78, being an average of $23.78 in free gold per ton, at a cost "of $15,500; and assuming further that the Good Hope mining "claims were 4,000 feet in continuous length, and in other respects

"were not developed, and that the main shaft was in ore at its "lowest depth, and that the levels were in ore at their ends and "throughout their length, and that there was nothing seen, visible, "that afforded any reason for believing that the ore body did not "continue in length and depth for an indefinite distance, what, in "your opinion, was the fair market value on the 1st of January, "1894, of such a mine?

"A. From $902,000 to $1,375,000, based upon the two different "sets of value given in the report and in your question" (fols. 720-24.)

"Q. And what were those two different sets of values?

"A. One, a positive statement, is that the ore is worth at least "$18 a ton, free milling gold, and that value is taken in "the calculations that are made on the various blocks of "ore estimated in reserve and in sight. On that basis "of $18 a ton, and $7 a ton expenses, and on an amount "of 82,000 tons which are estimated—44,000 in one case and "37,000 in the other—it leaves a net profit per ton of $11. "Eleven times 82,000 is 902,000. That is entirely outside of the "value in the future" (fols. 724–25).

"The other value leading up to 1,375,000 is based on the "result of a mill run, giving the value of the actual product as "$23.78 per ton, and the net of that would be $16.78, and eighty-"two thousand times that would be $1,275,000" (fol. 725).

The improper and objectionable assumptions in these questions are of two kinds: First, of representations as to facts at the time the mine was bought, as to which there is no evidence whatever. Second, of representations which, even if they had been made, would not have been actionable as mere statements of opinion, and which can, therefore, even if false, form no basis for assessing damages.

1. Assumptions of representations as to facts at the time the mine was bought, as to which there is no evidence whatever.

"A. That the ore body in the mine had an average value of at "least $18 a ton free milling gold, and that there was of said ore "44,733 tons in reserve above the second level and 37,333 tons in "sight below the second level at the time of the purchase."

These are the figures which Olcott multiplies in obtaining his market value. There were no false representations claimed to have been made by the defendant, except the publication of the so-called Burnham report, speaking as of February 1, 1892, and no other frauds were claimed to have been practiced by him, except certain

alleged concealments and an alleged falsification of the mill run, leading up to an alleged deceit of Egan, the expert, who examined the property in November, 1893, just prior to the purchase.

Egan made a report, giving his opinion of the average value per ton of free milling-gold ore body in the mine, and his estimate of the number of tons of ore in reserve and ore in sight.

It further appeared that the mine was worked substantially all the time between February, 1892, and November, 1893 (fols. 1403, 882, 77, &c.). There could, therefore, be no assumption that there was the same amount of ore in reserve and ore in sight in November, 1893, as there was in February, 1892, nor that its appearance would indicate the same value per ton.

The assumption, therefore, that the statements in the Burnham report of estimates of ore in sight and in reserve and of the value of it were representations as to the amount of ore in reserve and in sight, and the value of it in November, 1893, was wholly without evidence to support it, especially in view of the fact that the expert Egan upon his own examination had made his own and a different estimate as to each of these three factors, and that plaintiffs purchased through him as their agent after reading his report.

Nevertheless each of the factors in the hypothetical question upon which Olcott bases his result of $902,000 is the estimate in the Burnham report as of February, 1892, and not the estimate in the Egan report as of November, 1893. The Burnham report gives the average value of $18 a ton (fols. 1430 and 1440): Egan, of $17 (fol. 1406). Burnham gives the total number of tons of ore in reserve and in sight at 82,000 (fols. 1433 and 1440); Egan, 66,000 (fols. 1406 and 1410), a difference computed in accordance with his method of $1 on 82,000 tons + $17 on 16,000 tons, or $356,000.

Furthermore, the question and answer assumed 37,333 tons in sight below the second level. The statements in the Burnham report were:

"The ore on the lower level *below the reserves* having been "opened in three places to an *average* of 33 feet (fol. 1438), this ore "in sight * * * gives a tonnage of 4,950 tons;" and "as both "the San Jacinto and Good Hope mines have produced beyond "question large sums of money, * * * reaching on the north "end of the ledge (San Jacinto) a depth of 110 feet and on the "south end 150 feet (Good Hope), leaving a large block of ground "between them. Now, as connection has been made with the

"south workings, and it is clearly proven to be one continuous vein, "and as the *surface cuts* and shafts show its continuity to the old "workings with * * * places ore in sight to at least the depth "of the present workings," between them "equal to 37,333 tons" (fol. 1440).

"In a few months this entire block" (*i. e.*, between the workings) * * * "can be placed as ore reserve" (fol. 1440). Egan's report says with reference to "ore in sight":

"I also measured and sampled the ore showing along the "bottom of the second level north and south as far as practicable "without taking up the track to get the foot-wall streak accurately, "and if anything it averaged larger in size than in the back of the "same level, hence it is fair to estimate it as ore in sight, the ques-"tion of its extraction being only of sinking the shaft 30 feet fur-"ther and driving levels from the bottom." He reckons this ore under his feet at 19,833 tons (fols. 1409-10).

Plaintiff's experts unite in admitting that there is not a recognized principle among reputable mining experts to estimate the value of ground beyond the development or below the development, and that ore in sight is what you can see and measure on the several side and is the same as ore in reserve (Foster, fols. 478-80; Olcott, fols. 737-8).

Olcott says: "I estimate the ore in sight by measurement, first "as to the ore *blocked out* and then by * * * carefully sam-"pling." Thus "that completes the ore in sight in my way of "estimating, and in reputable, correct practice. I do not estimate "ore an inch further down than the lower level; further than the "ends of the level each way" (fols. 737-8). "Nothing is figured in "the ore in sight unless you can get to the four sides of it" (fol. 740).

(Olcott continues, fol. 738:) "Q. And if that assumption is the "taking into consideration of any ore below the bottom of the level, "that should be thrown out, should it not?

"A. I should, in making a correct estimate; certainly. I am "not talking about the correct estimate.

"Q. And if your estimate takes in ore north of the end of the "drifts as they then appeared, that should be thrown out?

"A. It might be as a matter of precaution.

"Q. You have stated that you did not, in estimating the ore in "sight, take in beyond the workings in any direction?

" A. I have said that I did not, and I do not think correct prac-
" tice allows it.

" Q. So that, when you say that the mines have been sold on
" the basis of the ore in sight, you mean correct practice as to ore
" in sight ? A. I do, and on the statement of men who have a
" reputation " (fols. 738, 739).

The 37,333 tons mentioned in the Burnham report as ore in sight, and contained in the hypothetical question, being a guess as to the contents of the unexplored territory between the Good Hope and San Jacinto workings, Olcutt's admissions dispose of that as an element of value ; and the 19,833 tons mentioned as ore in reserve in the Egan report, being therein stated to be " an estimate of what " might be expected below the last workings," Olcott's admission disposes of that as an element of value.

The result of these admissions was, therefore, to strike from his estimate the entire ore in sight (so-called) assumed there, the ore assumed in the question being the entire ore in reserve or in sight proper to be reckoned in any estimate.

The exaggerations in estimated value, occasioned by the two erroneous assumptions in the question put to Olcott, and in his answer of $902,000 were, therefore, one dollar a ton (Egan's estimate being $17) on 82,000 tons—$82,000 ; the ore in sight, erroneously so-called, 37,333 tons, at $17 a ton, less $7 a ton estimated expenses, or $10 net, equals $373,330, or a total of $465,333.

Who can say that an erroneous assumption resulting in the exaggeration of an estimate of value by a half—that is, by $465,000—would have no effect upon the jury ?

We submit, therefore, that the motion appearing at folio 1349 to strike out the testimony of the witness Olcott on the ground that it affords no criterion to go to the jury—that, upon his own statement, in answer to the hypothetical question put to him, the data would not permit of an accurate answer, should have been granted, and that its denial was error.

The same errors enter into Olcott's estimate of $1,375,000. That estimate he obtained by multiplying the same tonnage of ore in reserve, plus the same tonnage erroneously stated to be " ore in sight," by $23.78 per ton, with respect to which last amount the statement in the hypothetical question is as follows : " That in a twelve
" months' mill run 2,434 tons of ore had been mined, and milled as
" mined from said mine, and had produced in bullion $57,879.78,
" being an average of $23.78 in free gold per ton " (fols. 721, 722).

There is no pretense of any such statement, except that plaintiffs claim it is contained in the Burnham report. That the resultant of the Burnham report is not the statement assumed, appears from a reading of it, and is discussed in the preceding part of this brief. But, in any event, the question does not state that twelve-months mill run is referred to, whether just preceding the purchase, or at some time or at any length of time before it.

The production of a mine, continuously worked, for any specified year, a number of years prior to a purchase, cannot, in the nature of things, be multiplied in obtaining its market value. In fact, it is inconceivable that any years' production, except the last one, could be treated as such a factor; and there is no pretense that this twelve-months mill run mentioned in the Burnham report could have referred to a mill run ending later than February, 1892—nearly two years before the purchase.

There are other assumptions in this hypothetical question, without basis in the evidence, as follows:

"Each level being in the vein its entire length on January 1, "1894":

Egan does not so report, and did not so testify. On the contrary, in his report of ore in reserve (fols. 1405–6) he does not reckon, in estimating the vein, 66 feet on the first level north, and 30 feet on the second level north, reckoning out of the 700 feet but 634 feet in one instance, and 670 in the other.

The Burnham report also, as a whole, does not state that each level was at that time in the vein its entire length. But whatever be the statement in the Burnham report, it could not have referred to, or been believed by the plaintiffs to have referred to, the period of Egan's examination of their purchase, in the face of his own report.

"That the levels were in ore at their ends, and that there was "nothing seen visible that afforded any reason for believing that "the ore did not continue in length for an indefinite distance":

There was no evidence as to representations by Sigafus or any one else on his behalf, that they were in ore at the ends.

There were boards at one end, and a heap of débris at the other. This evidence has been previously discussed. The experts on all sides agree that Egan was not warranted in believing or reporting anything with respect to these ends, without looking to see. Egan admits that the defendant did not make any false statements to him, but omitted to tell him that the workings ran beyond some parts at

one place, and a heap of dirt at the other (fol. 308). And further admits that with respect to the last he was told that the mine ran some distance further, but how much his informant did not know (fol. 230).

THE SECOND QUESTION AND ANSWER OBJECTED TO IS AS FOLLOWS:

Q. Assuming that the Good Hope Mine was opened up by two levels, each 950 feet in length, level No. 1 being 250 feet below the surface level, No. 2 being 100 feet below level No. 1, each being in the same ore body and connected with a main shaft 416 feet deep; and assuming that this ore had an average width of 18 inches, that it was not a continuous body, but pinched in and out in different places, so that one-fifth of the ground between the surface and the second level was barren ground; that beyond the north end of the apparent second level the level had been drifted not less than 80 feet in barren ground, the vein lost and nothing to indicate it extended beyond said north end, and thereupon this opening into the barren ground had been closed up and concealed from view; and assuming, also, that beyond the south end of the apparent second level, that level, for not less than 150 feet, had been driven in barren ground, the vein lost, and no indication that it extended further than said south end, and that this extension of the south end had been closed up and concealed from view; and assuming that the ore in reserve in said mine did not exceed 33,550 tons, without deducting any allowance for said barren ground; and assuming, further, that the ore in sight did not exceed in quantity 27,999 tons; and assuming, also, that the average value of the ore mined did not exceed $11 per ten; that the cost of mining and milling it was not less than $11 a ton, and that there was no reliable record of what it had done in the past, and that the mining claims, of which this mine was a part, were 4,000 feet in continuous length, and were developed only as herein stated; on those assumptions, what, in your opinion, was the fair market value of the property of the same date, January 1, 1894, including the mine?

A. I should say that such a mine was, commercially speaking, valueless, on the basis that it cost as much to extract the gold as the total product of the gold in ore (fols. 728–32).

The principal improper and objectionable assumptions in this question are as follows:

(1) *That the average value of the ore mined did not exceed $11 per ton.*

This being a question framed to elicit a reply as to what the mine was actually worth, the assumption should have been as to the average value of the ore which the mine actually contained.

The extent of the proof in this respect is tabulated in Plaintiff's Exhibit 25 (fols. 1589–93), and under the testimony goes no further than this, viz.: That the value per ton of what plaintiff's superintendents reported that they obtained from milling such rock as they took out and ran through the mill as ore, was $11.10 per ton. The testimony as to what rock they took out and what they milled for ore is set out at length at pages 63–71 of this brief above, from which it appears admitted that of the two veins the hanging wall vein and the rich foot wall vein there is no certainty that they took out any considerable portion of more than one vein in a place, leaving the other in place; that the method of stoping was such that the waste was inextricably mixed up with the ore, and that waste and ore together were run through the mill; the effect being that, in the first place, their results do not show what ore there was in the ground, and, in the second place, the average per ton of the rock through the mill as ore does not show and is not evidence of what the value of the ore aside from the waste was; that is to say, assuming that the custom was as Boicourt testifies, to run through waste and ore in about equal proportions. If two tons of the *mixture* averaged $11.10, as shown in their table, there must have come from the one ton of ore $22.

Owing to the impossibility of saving all the ore, the waste would rob and carry through in the tailings a further certain proportion of gold, so that in addition to the fact that the series of superintendents were either dishonest or incompetent and without experience, the admitted facts show that they did not take out the ore and that they milled ore and waste together, and there is absolutely *no* proof that the average value of the *ore* mined did not exceed $11 a ton.

B. That the cost of mining and milling was not less than $11 a ton.

This is a mere arbitrary assumption. There was no evidence introduced showing that the cost of mining and milling during any period before the sale was $11 a ton or any such sum. In any event, the proper assumption as to this would have been that

the fair and reasonable cost of mining and milling it was not less than so much a ton. The substance of plaintiff's testimony as to what it cost them is contained in Plaintiff's Exhibit No. 25, in which they show that the average cost per ton was $10.77 under their management, and there is an absolute absence of testimony that this was a fair and reasonable expense; but, on the contrary, in addition to the testimony as to the incompetence and dishonesty of the superintendents, all the experts who examined the property agree in fixing the proper charge for such expenses at about half of this (fols. 1222-3, 1272, 1275).

(C) *That beyond the north end of the apparent second level, the level had been drifted not less than 80 feet in barren ground, the vein lost and nothing to indicate it extended beyond the said north end.*

The proof as to this was that they had run off the vein, as Egan found afterwards, and that it was there simply a case of mistake of judgment in losing the vein; and, furthermore, that an upraise was then being worked which was in ore on its face; that the drift at the upper level had ore on its face, and the holes along the surface showed that the vein extended for hundreds of feet north of this point.

(D) *That beyond the south end of the apparent second level, that level for not less than 150 feet, had been driven in barren ground, the vein lost and no indication that it extended further than the said south end.*

Egan does not pretend this was barren, but "that the vein, or what little there is of it, was split up and deflected about 30 degrees, and was in hard, tight granite, and, so compared with the rest of the mine, was barren" (fols. 234-5).

Smith and Goldsworthy's samples from this vein averaged $6.70 a ton (fol. 1211, and Map Ex. I.).

The objections to the testimony of Egan as to value, upon hypothetical questions put to him, are taken at folios 277-78.

The questions objected to were, first, a question intended to elicit an estimated value of the property if it had been as represented, based on assumptions of material facts with regard to the property which plaintiffs claimed had been proved; and, second, a similar question as to its estimated actual value at the time of purchase.

The questions were each objected to as incompetent, immaterial and irrelevant upon two main grounds: First, that material representations were assumed to have been made—material facts were

assumed to have existed—without basis in the evidence; and, second, that the first question was based upon a misapprehension of the rule as to the measure of damages.

The questions and answers objected to are as follows:

"Q. Assuming that the ore body of the Good Hope Mine had "an average value of at least $17 per ton, and that the average "width of the vein was 24 inches; that the length of the vein "described by the workings was 950 feet; that the workings of the "mine consisted of the main shaft, 416 feet deep, and the south "shaft 391 feet deep, the south shaft being 250 feet distant from the "main shaft, with the drift in the first level at a depth of 250 feet "from the surface—950 feet long—with the opening of from 4 to 5 "feet wide, 5½ to 6½ feet in height, with the drift in the second "level, 350 feet below the surface—950 feet in length, with the "opening of the same size, this drift in the second level running "beneath the first for the entire length, and assuming that there was "nothing at the end of the drift to indicate that the vein pinched "out or disappeared, what, in your opinion, would have been the "fair market value of this property?

"A. From $700,000 to $1,000,000 (fols. 275-7).

"Q. Assuming the same conditions, with these modifications, "that the average value of the ore was $10 per ton, that the aver-"age width of the vein was 18 inches, and that the conditions on "the apparent ends of the drift of the second level were such as "you subsequently found them, and have heretofore stated on this "deposition, what, in your judgment, was the fair market value of "the property?

"A. About $50,000" (fols. 275-78).

The material differences in these questions, which produced in Egan's mind the difference of value between from $700,000 to $1,000,000 in one case and $50,000 in the other, were as follows:

Estimate of $700,000 to $1,000,000.	Estimate of $50,000.	
$17.	$10.	Average value of ore body of Good Hope Mine unextracted.
24 inches.	18 inches.	Average width of the vein.
There was nothing at the end of the drift to indicate that the vein pinched out or disappeared.	That the conditions on the apparent ends of the drift on the second level were such as you subsequently found them and have heretofore stated in this deposition.	

With respect to these three factors, Egan's testimony is as follows:

1. "Q. What was the average value per ton of ore that you "actually got out of the mine during the entire period that you "worked the mine, about one year? A. About $10" (fol. 265).

It will be noticed that this was not testimony as to what a careful examination would have indicated the value to be, nor as to what the value really was; but only as to the value of the ore which he took out.

It appears by the testimony as discussed in the preceding part of this brief, that the purchasers ran through ore and waste mixed in about equal proportions, thus reducing its apparent value by a half.

2. Egan says he measured every ten feet of the workings (fol. 322); that the measurements he took averaged from two inches to several feet; that there were about 200 measurements taken (which he did not produce), and that the average was 24 inches, and that after the whole interior had been exposed he found the average about 18 inches (fol. 237.)

With respect to this, Eagan made his own examination, and formed his own opinion. The experts agree that he was not warranted in assuming anything that he did not see with respect to the width and value of the ore.

3. With respect to the conditions at the apparent ends of the drift—that is, the boards at one end, and the heap of waste at the other, which he took no pains to investigate, not even the trouble to ask the defendant with respect to them he says himself:

"Q. Then, in your opinion and judgment, what was the differ-"ence in value of that mine as indicated by what you saw on the "second level, compared with the value you would have attached "to it if you had seen the concealed portions of that level? A. It "is a hard question to answer; but I would have made no further ex-"amination with the idea of purchasing; I would not have advised "its purchase (fols. 236–7).

"Q. If the drift had really ended where the defendant Cheatham "said, and if the mine had only been worked as far as they stated "to you, what, in your opinion, would have been its fair market "value in comparison with what it was, worked and open as it "actually had been? A. It would be hard to give in figures; but "in one case a prospective value existed which did not in the "other" (fol. 251).

In other words, this enormous difference of what Egan claims is market value is that in one case a prospective value existed which did not in the other.

His multiplication of what he says he found to be ore in reserve and in sight, by what he says he found to be its average value, reported by him to be about $797,674 in one case (fol. 1405), plus $337,161 in the other (fol. 1410), in all over $1,100,000, would not then have influenced him to buy the mine or to have recommended its purchase.

These admissions show clearly that the basis assumed in the questions intended to elicit from Egan his opinion as to the fair market value of the mine was wholly unreliable, and that his estimate was nothing but a guess.

This Egan admits (fol. 328): "Q. Then when you testified the "mine to be worth $50,000 or thereabouts, the $1,000,000 computa-"tion of value would be based upon portions of the mine you "didn't see? A. Yes, sir. but I saw the surface.

For a further and most material reason the hypothetical questions put to the experts were incompetent and inadmissible.

Plaintiffs' counsel failed to include in any of these questions, or to state in a separate question, the condition of the mine from 35 feet above the first or upper level to the surface. That is to say, a depth of about 200 feet.

Egan figures this (fols. 1405–6) First level north, 517 feet long by 224 feet high, ore in place, of the average width of 28½ inches, 22,517 tons, at $17 a ton	$382,789
First level south, 250 feet long by 210 feet high, ore in place, average width 20 inches, equals 8,020 tons, at $17 a ton	136,340
Total	$519,129

The height of these blocks is the estimated height from the top of the stope over the level to the surface.

All of the plaintiffs' witnesses who testified on the subject agree that from a point about 35 feet above the first level, or 200 feet down from the surface (fol. 1402) the distance between the two walls of the mine commenced to widen, and widen rapidly; that the two portions of the vein, that is, the foot-wall and the hanging-wall vein followed the widening walls, leaving large and blocky ground between, and that, for this reason, the upper portion of the mine afterwards proved to be much more expensive to work, and consequently of little value (fols. 674–9, 656, 425–53, 692–4).

There is no pretense that the defendant or any one knew or could have known of this condition of things in ground that was unexplored at the time of Egan's examination. Defendant is, therefore, not chargeable with any damages or loss or increased expense in working occasioned to the plaintiffs by reason of this fact.

This unknown fact, which illustrates the impossibility of assuming from any surface of rock that a particular vein will continue of a particular width, character and richness, for a given length and depth into unexplored rock, was of no small consequence; and the widening of the walls and the splitting of the vein by large and blocky ground, which was difficult and expensive to timber, affected an unexplored section of the mine (which Egan figures as ore reserves of a specified value) 767 feet long by 200 feet high, and his valuation of over $500,000 therefor.

Such an omission of a material fact, bearing directly upon the question of value, and admitted on all sides to have been something that no one could have known at the time, but to have been a factor which proved to seriously diminish the value of this portion of the property—could not but vitiate all the hypothetical questions which did not include it, and all the estimates based upon them.

This testimony as to the value of the property, if it had been as represented and as to what it actually was, given by Olcott and by Egan, is the entire basis for the extraordinary and excessive verdict of the jury, by which plaintiffs obtained a judgment for $184,000 more than the total amount paid for the property, and $289,000 more than their own investment.

It was, therefore, error in the Court to admit the testimony when offered, and further error to refuse to strike it out at the close of the testimony.

Hypothetical questions are allowed to be put to experts, but the hypothesis upon which they are examined must be based upon facts admitted or established by the evidence, or which, if controverted, the jury must legitimately find on weighing the evidence.

Matter of Maury, 60 Hun, 46.

"It is error to admit as evidence the opinion of an expert based "upon a hypothetical case, formed in part of facts of which there "is no proof."

Matter of Will of Ames, 51 Iowa, 596.
Jewett vs. Brooks, 134 Mass., 105.
Russ vs. Wabash, West. R. Co., 112 Mo., 45.
People vs. Sessions, 58 Mich., 594.

"Questions cannot be based upon suppositions of which there is "no evidence, tendency of evidence, or offer of evidence."

N. A. Acc. Ass. vs. Woodson, 64 Fed. Rep., 689.

2. "Immaterial matters introduced into a hypothetical question "will render it objectionable, because it thereby becomes misleading to the jury."

Russ vs. Wabash, W. R. Co., 112 Mo., 45.
Prentis vs. Bates, 88 Mich., 567.

3. "Material omissions in the statement of facts in a hypothetical question will render it inadmissible."

Marshall, &c., Co. vs. McKelvey, 55 Mo. App., 240.
Barber's App., 63 Conn., 393.
Prentis vs. Bates, 88 Mich., 567, at p. 590.
Briggs vs. Minn. St. R. Co., 52 Minn., 36.

In *Waring vs. The United States Telegraph Company*, 4 Daly, 233, it is said in respect to testimony improperly admitted: "We "cannot say the jury were not influenced by it; that it could not

" by any legal possibility have affected the verdict; and, where such " is the case, the only safe course is to order a new trial."

The Court erred in denying the motion to dismiss the complaint.

Assignment and specification of error, No. 24.

This motion first occurs at the close of the plaintiffs' case (fols. 752–56), and is renewed at the close of the testimony (fols. 1350–53), and is as follows:

" I move to dismiss the complaint, on the ground that the cause " of action set forth in it has not been proved. The cause of action " set forth in the complaint is, in substance, that the defendant " through one Willim H. Griffith entered into negotiations with the " plaintiffs for the sale to them of certain lands and mines, mining " claims and appurtenances, and that prior to the 28th day of De- " cember, the plaintiffs entered into negotiations for the purchase " of said lands, and the defendant falsely and fraudulently repre- " sented to the plaintiffs the misrepresentations which have been " stated by counsel for the plaintiffs in his opening, and did to the " plaintfffs the fraudulent acts which are complained of. I move to " dismiss the complaint, on the ground that this cause of action " has not been sustained.

" 6. That there is no evidence that the plaintiffs in this case " relied in any manner upon the statements which were made by " Mr. Sigafus " (fols. 752–56; 1350–53).

This motion was denied at the close of the plaintiffs' case, and also at the close of the testimony, to each of which rulings the defendant by his counsel then and there duly excepted.

The Court below, without passing upon the question whether the cause of action set out in the complaint was proved, held that the omission to except to that portion of the charge of the Court which directed that the jury might find for the plaintiff on a cause of action different from that pleaded, was, in effect, a waiver of the exception to the motion to dismiss (Rec., p. 620), but plaintiff in error respectfully contends that exception, duly taken, to refusal to dismiss at the end of plaintiff's case and at the end of the whole evidence, placed clearly on the ground that the cause of action set forth in the complaint is not proved, is sufficient. After a question has once been distinctly passed upon and exception taken, it is not necessary to multiply exceptions by repetition when the question

arises again. If it was curable by amendment of the complaint, that could have been done, and it was the duty of plaintiff to move such amendment when the motion was made to dismiss.

There was no pretense of any direct communication between plaintiffs and the defendant prior to the purchase by plaintiffs.

Egan went out to examine the mine in the hope that he and Morse and Platt (who afterwards dropped out of the venture) might be able to turn the matter in some way to their advantage.

Egan made a report in writing (Plaintiffs' Ex. C, fols. 1392–1415), addressing it to Morse, under date of November 29, 1893, together with the so-called Burnham report (Plaintiffs' Ex. A, fol. 1416), which bore no date or signature, and which contained apparent errors of computation and summary, some of which have been already noted in this brief.

This Eagan report and the so-called Burnham report, which Egan stated he visited the Good Hope for the purpose of verifying (fol. 1392) were submitted to the plaintiffs. Egan says: "I also made oral statements to Mr. Morse, Mr. Porter and Mr. Hobson. These three I referred to my report and the statements made in my report, and advised to purchase (fol. 273).

The plaintiffs testify as to what they relied on, as follows:

Morse says that after he had met Egan and Platt in New York, upon Egan's return to the mine, and Platt had failed them (fol. 362), he (Morse) went over to Haverhill to see if he could interest his friends there in the enterprise, and took the report to Hobson. Hobson asked to show it to Porter (fols. 362-63), and later Porter and Hobson asked whether Egan could be seen, and Egan was sent for and introduced to Porter and Hobson, and showed samples of ore, and then they went to Boston, and the trade was made (fols. 363-64). "I depended in going into this enterprise and in getting "these other people to go in with me, on the report of Egan. Q. "What dependence did you place, if any, upon the Burnham re-"port? A. That he had verified it" (fol. 264).

Hobson says: "I depended upon the statements in these two "reports. * * * The next day I made inquiries about Col. "Egan (fol. 398). The credit that I gave to this paper, this Burn-"ham report, was based on the information that I had from Mr. "Morse or Mr. Egan, or both, that this was a report made by a Mr. "Burnham, a mining engineer, and the confirmation which Mr. Egan's report gave to this report (fol. 495)." He then admits that "if he had examined the Burnham report with any care he would

have noticed the erroneous summaries and discrepancies in it; and finally admits: "I mean to say that I relied upon the Burnham "report as confirmed by Col. Egan" (fol. 414).

Porter says that he relied only upon the Burnham report as corroborated by Egan (fol. 528), and that if he had examined the Burnham report with any care he would have noticed its discrepencies (fols. 528 *et seq.*).

In other words, it was Egan's report of what he claimed to have seen and ascertained upon which the plaintiffs relied in making their investment. It appears, however, conclusively by the admissions of Egan that he did not report what he found with respect to some things; that he reported as facts other things which he did not attempt to verify, and that certain of his estimates proved fallacious, owing to facts that no one knew at the time of his examination.

Egan's Fraudulent Misrepresentations and Mistakes.

The examination of the witnesses and evidence introduced by plaintiff when dissected upon cross-examination and analyzed, disclosed most material fraudulent misrepresentations and mistakes to have been made by Egan—first, in his statement of the actual results of his examination; and, second, in the method of it, as stated by him—and also that certain estimates made by him proved fallacious, owing to facts that no one knew at the time.

First. His misstatement of facts disclosed by his examination.

(A) Measurements.

Egan gives dimensions of the blocks which he uses in figuring the contents by the length of the levels and the measurements down the shafts.

As to discrepancies in the length of the levels, nothing appears, for they were extended by the new management.

The careful survey made by Smith and Goldsworthy and introduced in evidence (Defendant's Exhibit I.) and admitted by plaintiffs' witnesses to be correct, and testified to by Mr. Smith at folios 1218-19, discloses the following discrepancies:

Depth of first level stated by Egan *250 feet*, actual depth *236 feet*, distance between levels stated by Egan *100 feet*, actual distance *94 feet*, and it further shows by the level drawn at the top of the shaft, that this distance down the shaft is greater than the average distance of the level below the grass roots, on account of surface displacements.

B. Bullion returns, which Egan says were shown him:

Months.	Certificate.			Egan's Stmt.		
	Tons.	Amount.	Average.	Tons.	Amt.	Avge.
July	160	$2,757 47	$17 25	160	$2,760	$17 25
Aug. & Sep.	300	$4,893 56	$16 03	300	$5,008	$16 69
October	112	$1,362 23	$12 16	112	$1,850	$16 52
Grand Average			$15 76			$16 81

C. Average assays:

Egan's statement in the report (fol. 1404) "average of assays "made, exclusive of high assays, such as those previously men- "tioned, was $23, and one made of the eight-inch streak in the "breast of the first level north, $884.40." Details of these assays are not given in the report, but in Egan's letter (Defendant's Exhibit C, fols. 1665 to 1667) it appears, as computed by Mr. Smith (fol. 1216) that this average was *but $17.44*.

Again Egan reports the sulphides carried an average value of about $7 a ton in the tailings (fols. 1404–5), and the loss in tailings (fol. 1407) is reckoned by him at $7.

His same letter (at fol. 1665) contains the statement that he must have made some serious mistake in sampling the tailings, as Mr. Graham's assay gave $2\frac{80}{100}$ ounces gold and $1\frac{70}{100}$ ounces silver, while the crude ore ran $1\frac{50}{100}$ ounces gold and one ounce silver, showing (fol. 1217) the true assay of the tailings to be $57.88.

Again Egan's report gives (fol. 1407) "crude ore assaying *$38 "per ton*," whereas his letter, Exhibit C, folio 1665, shows (see fol. 1216) an average of only *$31*.

(c) Egan's test mill run:

Sixty-two skip loads were hoisted to Egan's knowledge, stated by him in his report to have been taken from the quartz alone, that is, sorted ore. This mill run, he reports (fol. 1407), to be *of 25 tons*. These 62 skip loads held, it is admitted on all sides, *from 40 to 47 tons* (fol. 1220). Egan knew this (fols. 320–1).

Again Egan reports the retort 51 ounces (Troy) of gold 710 fine (fol. 1407), $724. His testimony (fol. 326) is 55 ounces avoirdupois, which gives (fol. 1217) $674.87.

Again, his report (fols. 1406-7) and his testimony (fol. 258) gives the average of this mill run to *be $16.97*, whereas the true average, computed upon his own figures (fol. 1220), *gives only $15 to $17*.

Egan's true mill run therefore, $15 to $17, is substantially the same as the true average of the bullion receipts July, August, September and October, 1893, upon which alone he claims to have relied as to the past history of the mine in this respect, and which were the only bullion receipts or statement of bullion receipts which he claims were shown him. It agrees substantially with the testimony of Sigafus as to his production, with the average value stated in the true Burnham report (fol. 1655), and the average value shown by Smith & Goldsworthy's examination (fols. 1189, 1274). These errors and extraordinary exaggerations, considered in conjunction with his letters to Morse and Platt, written at the time of the examination, disclose the true character and purpose of Egan in making his examination and report, *viz.* : to exaggerate the value of the mine for the profit he expected to make out of it.

SECOND. His errors in the method of his examination as stated by him.

A. As to computation of ore in reserve, Egan made two errors, according to the testimony of experts on both sides.

First he estimated as ore in sight in present working below the second level, 19,133 tons, at $17, $337,161 (fol. 1413). This was estimated to a depth of 30 feet below the bottom of the shaft (fol. 1410). The only possible measurements that he could make or says he made are along the bottom of the level, that is, the top of this block, and "by an examination of the shaft when the water was lowest and very careful inquiry," but he does not say of whom (fols. 1409-10). The experts on both sides agree that this was improper.

Foster, plaintiff's expert, says :

Q. "How far down below the last level did you usually reckon "ore in sight?"

A. "Right on the upper surface on the bottom of that level;" "I understand ore in sight means what you can see and what you "can measure;" "I should not think it differs from the proper "reserve."

Q. "Do you reckon any ore below the lowest level as ore in "reserve."

A. "Not in setting a value for a prospective purchaser."

Q. "Are the principles of such estimates well understood among "mining experts?"

A. "Yes, I think so. It is not a recognized principle among "mining experts to estimate the value of ground below the lowest "developments of the mine" (fols. 477–479).

Olcott, also plaintiff's expert, says: "I estimate the ore in sight "by measurements, first, as to the ore blocked out, and then by "careful sampling as to the value of that ore. That completes the "ore in sight in my way of estimating and in reputable correct "practice. I do not estimate ore an inch further down than the "lower level; further than the ends of the level each way" (fols 737–8).

"Nothing is figured in the ore in sight unless you can get to the "four sides of it" (fol. 740).

His second mistake is that he believed and assumed that certain portions of the levels, which were stulled and lagged, that is, covered up by timbers and boards, would show continuous ore back of the stulling and lagging, without making an examination of them.

Egan nowhere says that he was so deceived, and his report shows that he was not deceived. He reports that he measured every ten feet, and in the table of ore in reserve (fols. 1405-6) omits 66 feet in lineal measurement of the 700 feet which he gives as the length of the first level north and 30 feet in lineal measurement of the 700 feet which he gives as the length of the second level north. There is no evidence that he was told anything in regard to it, and experts on both sides agree that he was not warranted in any such assumption.

Olcott, plaintiffs' expert, says:

Q. "But suppose you do not break in there and do not examine, "would you, or would you not, figure it in?"

A. "Your hypothesis is not intelligible."

Q. "Then you would break through and examine it?"

A. "I certainly would."

Q. "In case an expert did not break through and examine it, "should he, or should he not, figure it in as ore in reserve or ore "in sight?"

A. "He should not figure it in as ore in reserve or in sight "without examining it" (fols. 742–43).

B. Egan also claims to have been deceived into believing that

the second level ended at the north where a heap of refuse filled the end, and at the south where boards filled the end. He testifies that the defendant made no representation in regard to it to him, other than omitting to draw lines there on a rough sketch or map, which he says was a sketch of the main workings of the mine and that he relied upon the statements of the foreman of the mine, Cheatham, that the level ended in the boards at the south end, and that he, Cheatham, believed that it went to a few feet further than the debris in the north end, but did not know. The experts on both sides agree that such a conclusion was unwarrantable.

Olcott, plaintiffs' expert says :

Q. "In case a reputable expert at the end of the level where "there is no stope, but an upraise, came to a heap of refuse lying "at the bottom of the upraise, what should he do in regard to "that heap of refuse? Assume that it is the end of the level?"

A. "He ought not to take any chances."

Q. "Should he rely on the statement of the miner that 'I don't "'know how much further that was driven; I was not there then, "'but think it was no more than three or four feet.' Would he be "warranted in assuming that that was the end of the level?"

A. "No, sir; he would not."

Q. "In case an expert comes to a planking set up at the end of "a level, should he or not assume that that was the end of the "level?"

A. "He should not."

Q. "Would the failure the owner of to notify him that that was "not the end excuse him from investigaton?"

A. "It would not."

Q. "Would the failure of the owner to notify him that the heap "of refuse was not the end excuse him from making such an exam-"ination of that refuse heap?"

A. "It should certainly be moved" (fols. 743–44).

This is corroborated by the defendant's experts (fols. 1207, 1270). It is difficult to see from the evidence any warrant for the conclusions that Egan was deceived as to either of these ends.

Egan says: "In the north drift it was simply a mistake in judg-"ment in losing the vein (fol. 235). "At the breast of the north "drift there was no ore whatever, only a streak of rotten granite "that had evidently run off the vein, as we found afterwards" (fol. 234).

"In the south drift it showed the termination of the ore body "disclosed in the workings between the main and the south shafts." "In fact it looked as if the vein had split up, never to come to- "gether again" (fol. 235).

"At the south end the vein, what little sign there was of it, was "split up and deflected about 30 degrees, and is in hard, tight "granite, and so, compared with the rest of the mine, is barren" (fol. 235).

At the south end there was a dyke or intrusion of country rock which nearly shut off the vein so that it showed in a thin seam between walls of hard, tight granite. This dyke or intrusion of country rock shows upon the surface in outcroppings of rock or niggerheads just south of the south shaft, which cannot be followed to the north (fol. 902).

Egan and Sigafus walked over the surface (fols. 222, 901) where this outcropping was visible, and, in addition the fact that Sigafus testifies he explained this matter to Egan, and that Cheatham testifies that he and Egan went into this dyke on the second level south of the main shaft, there is the statement of the Burnham report, which Egan says he had in hand. "To the south the vein "had been found and still shows good pay, though the streaks "divide and probably the end of all pay ore to the south, is covered "by locations owned by the Company" (fol. 1424), and the entire absence in either the Burnham or Egan reports of any estimate or statement of value of this south end.

Egan's report, folio 1413: "Besides this ground (that is, the "open ground and that to the north) there is territory to the south "1,900 feet long, with an undeveloped value."

Egan's estimate of the value of the property is $797,000 ore in reserve between the ends, as he found them, and below the lower level, $337,000. Beyond the workings, to the north of where his examination was made $991,000 (fol. 1413), showing an estimate by Egan of over $1,100,000 between the ends as he says he saw them, but he says at folio 237 of his examination:

Q. "What in your opinion and judgment was the difference in "value of that mine as indicated by what you saw on the second "level, compared with the value you would have attached to it if "you had seen the concealed portions of that level?"

A. "It is a hard question to answer, but I would have made no "further examination with the idea of purchasing."

The experts agree, however, in the rule stated by Olcott and Foster, plaintiff's experts : " It is not a recognized principle among " reputable mining experts to estimate a value on ground beyond " the development " (fol. 480).

In determining the value of mines for prospective purchasers, Foster says : " I do not take into account any prospective value of " ground beyond the development at either end of any of those " mines " (fol. 477) ; and Olcott : " I do not estimate ore an inch " further than the ends of the levels each way " (fol. 738).

THIRD. Certain estimates made by Egan proved fallacious, owing to facts that no one knew at the time of his examination.

He reports : " This mine is not as expensive as the ordinary " mine to work, from the fact that the walls are hard and regular, " and the dip of the lode relieves the walls from the weight, so that " at the height of thirty feet the debris rests on the foot wall " (fol. 1400).

And he testifies (fol. 316) : " The width of the fissure was from " a few inches to five or six feet, or more or less."

At this time the stopes were at an average height of 20 feet. Egan figures the entire vein upon the basis that this width of fissure will continue to the top. Such, however, did not prove to be the case.

Morehead testifies : " The vein 30 or 35 feet above the first level " commences to diverge—to split. The waste material between the " foot wall and the hanging wall increased in size (fol. 648). The " veins were diverging very rapidly going upwards, and the com- " pany had quit operations, probably because it was costing them " so much " (fol. 647).

Foster says (as of the time when he arrived) : " The ore had " practically all been taken out 70 feet above the first level. Further, " to the grass roots, the main portion of the ore was in place. It " was dangerous ground. A man was liable to lose his life there " any minute, and it was never measured to the top, to measure it " exactly. They were old stopes that were shaky, and it was hard " to get a man to go there at all " (fol. 425). " Above the first " level, above these old stopes, the vein was broken up into a number " of quartz veins, varying in thickness from two to three inches. In " the surrounding ground, the granite, is what we call underground blocky ; it would come out in great big chunks, so that in order to take out eight inches of quartz you would be obliged to take out

from 12 to 15 feet of waste rock. It would come out itself, and it took a great deal of timber to hold it, in addition to being quite dangerous to the men. There were no places in these old stopes above the first level, where there was no quartz at all (fols. 426-453).

Boicourt says (fol. 693): "Above the first level the fissure "widened as you went up. The true foot and the true hanger walls "went away separate a good many feet. That was the reason that "made it especially expensive above there on the north side of the "old first. Up a ways in the stopes, above the first level, the foot "and hanging wall parted and went away off, and it was up in that "space that it was so very expensive to mine" (fols. 693-94).

Boicourt gives this widening of the fissure as the true cause (fols. 692-94). Morehead agrees with him, that it was more expensive to mine there, a great deal, than it was below (fols. 649, 656).

There is no proof that Egan was the agent of Sigafus for any purpose. Proof of deceit of the plaintiffs by Egan is not sufficient under the pleadings in this case, whatever may be the proof as to Egan's excuses for his mistakes and misrepresentations, to charge the defendant with them.

It may be that in a proper action under proper pleadings and upon proof that Egan was deceived by the defendant, and that defendant intended that Egan should publish a report, the contents of which he knew, founded upon such deceit, for the purpose of selling the mine to the public, and that they—a portion of the public—afterwards bought it, plaintiffs could recover, but such was not the proof here, and that is not this action.

Plaintiffs having been deceived by Egan's mistakes and false statements as to the material facts, with respect to which there is no pretense that Egan was deceived by defendant, cannot recover of defendant in this action.

The Supreme Court of Illinois, in the case of *Wachsmutch vs. Martini*, decided November 27, 1894, and reported in 39 N. E. R., 129, and 154 Ill., 515, discussed this question in a well-considered opinion, and in deciding the case held the above principle.

This was an action by plaintiffs, wholesale dealers in clothing, against defendant, a retail dealer, for fraud and deceit. Defendant ordered a bill of goods from plaintiffs through plaintiffs' salesman, and plaintiffs thereupon applied to a mercantile agency for a statement. The agency then wrote the defendant, requesting a state-

ment of his financial affairs and enclosed a blank for it. Upon receipt of this letter and blank defendant turned them over to his confidential clerk and bookkeeper with instructions to fill out the blank so as to show the condition of his assets and liabilities. The clerk answered in writing certain of the questions on the blank, and mailed it to the agency. Some of the material *statements inserted by the clerk and signed in defendant's name were false.* This latter fact does not appear in the opinion cited, but in the opinion of the Appellate Court below (45 Ills., App. Ct. Reps., 244). The Mercantile Agency, upon this statement, delivered to the plaintiff a statement containing totals, which totals were exaggerations of the totals properly calculated from the defendant's statement. Upon receipt of this report from the Mercantile Agency plaintiffs accepted the order and shipped the goods. Plaintiffs' credit-man testified that he relied upon the statement of the Mercantile Agency.

Defendant afterwards sold and assigned a portion of his property, and *confessed judgment upon a note which did not appear in the statement which had been sent by his clerk* to the Mercantile Agency, and upon execution under this judgment the rest of his property was sold.

The Court says: "*Here the statement which the Mercantile* "*Agency received* * * * *was materially and substantially dif-* "*ferent from that which the Agency submitted to appellants.* Which " of these two statements induced the appellants to give credit to " appellees and ship the goods?" "It was not the written state- " ment made by appellee or his agent * * * that appellants " relied on or that induced them to act as they did." "Some of the " items in the two statements are identical; others are very dif- " ferent." * * * "It would be mere surmise to conclude that " if the report to appellants from the Mercantile Agency had corre- " sponded with the statement forwarded * * * they nevertheless would have filled the order. A cause of action cannot be con- " structed upon so uncertain a foundation as a mere conjecture."

The Court erred in admitting evidence as to the acts, statements and declarations of Cheatham during Egan's examination (Assignments of Error 1 and 2).

The pretended basis for the introduction of this testimony was as follows:

Cheatham was acting foreman at the mine at the time Griffith asked permission of Sigafus for Egan to make his examination (fol. 22). After Egan had walked over the surface, at the collar of the shaft, as he was about to descend it, he was introduced by Sigafus to Cheatham as the man who had formerly been timberman, but was acting as foreman of the mine (fol. 227). After the three had gone down to the first level, Sigafus returned to the surface, saying he had a bad cold, and portions of the mine were hot, and others wet (fols. 228–22). Egan says that Sigafus then "in Cheatham's "presence told me that he [Cheatham] would go with me and ex- "plain every detail of the property, and give me every assistance "in his power—in fact, placed Cheatham's services at my discretion. "This was before I had begun my exploration of the mine. I "commenced the practical part of it as soon as Mr. Sigafus went to "the surface" (fol. 228).

Again: "Mr. Sigafus did not place any limitation of my time "for making the investigation" (fol. 306).

Again: "In my experience as a mining expert, in passing upon "the value of such property, before I recommend the purchase, I "make an independent examination. I did verify Mr. Sigafus' "statement to the best of my ability, and with the means at my "disposal" (fol. 308).

Griffith, plaintiffs' witness, says: "I remember Mr. Sigafus "telling Egan that he could examine the property in his own way, "and do as he pleased with it."

Egan desired a mill run and Sigafus told Cheatham that he was under Egan's charge; that Egan had full control of the mine for the mill run (fol. 791), and Egan ordered Cheatham to attend to a portion of the work in sending up the ore, going round himself to see where everybody was working (fols. 797–98, 245–46).

Sigafus was not present at the time of any of the alleged statements made by Cheatham or directions given by him, or at the time of any of his alleged fraudulent acts; and there is no evidence that he knew of any of them.

The experts of both sides agree as to the method of examination in such cases by experts. Olcott (fols. 738–45), Foster (fols. 477–80), Smith (fols. 1229–31) and Goldsworthy (fol. 1272) say that experts when examining a mine select their own samples, and do not rely upon any one connected with the mine to do it, and when they make a mill run do not lose sight of the men.

Under the practice of experts in such cases, and the facts proved as to the circumstances under which Cheatham is alleged to have made the statements, and the capacity in which he acted when he is alleged to have done the acts complained of, none of them can be charged to Sigafus.

Cheatham was not an agent for the purpose of making or assisting in making any sales or contracts for the defendant, nor had he ever been. He was foreman of the mine underground. The mine was put under Egan's control for the purpose of making his examination, and Cheatham was directed by defendant to go with Egan and do what he was told to do—in effect, the entire force of the mine under Cheatham was placed at Egan's disposal (fol. 228).

If a contract is induced by the fraudulent representations of third parties, there can be no relief on the ground of fraud, unless they are knowingly taking advantage of by the defendant, except where it is fraud of an agent, committed within the scope of his authority.

Fischer vs. Boody, 1 Curt., 406.
McPherson vs. Sanger, 1 Woodb., 138.
Korn vs. Hurd, Eng. App. Cases, 495.

But even the false and fraudulent acts of an agent, made in the course of his employment, while they may render the principal liable in an appropriate action, will not do so in an action for deceit, unless the principal co-operated in the agent's misdeeds.

Wachsmuth vs. Martin, 154 Ill., 515; and 45 Ill. App. Ct. Reps., 244.
Frayer vs. McCord, 165 Pa., 539.

"It is essential that the defendant's representations should have "been acted on by complainant to his injury. Where the purchaser "undertakes to make investigations of his own, and the vendor does "nothing to prevent his investigation from being as full as he "chooses to make it, the purchaser cannot afterwards allege that the "vendor made misrepresentations (*Attwood v. Small, supra*; "*Jennings v. Broughton*, 5 de Gex, Macnagton and Gordon, 126; "*Tuck v. Downing, supra*)."

Southern Development Co. vs. Silva, 125 U. S., 247, 259.

That the Court erred in admitting the letters of Egan written to Platt, a stranger to the transaction; to Roberts, a stranger to the transaction; and to Morse, during Egan's examination.

Assignments and specifications of error 14, 15 and 16.

These objections were taken at folio 395, and the letters and telegrams were admitted in evidence as Exhibits 13, 14, 15, 16, 17, 18 and 19 (fols. 1546-1565). These letters were objected to by defendant's counsel as not binding on the defendant, and as immaterial, irrelevant and incompetent. They were introduced upon the following basis only. *That those* letters *were* in Mr. Egan's handwriting. That the five exhibits 13, 14, 15, 16 and 17 were received by Morse in due course of mail; were all in relation to the mine, and that he had placed dependence upon the statements in these letters, among other things (fol. 394). There was no proof that Sigafus knew of these letters or of their contents, or authorized them, or knew they were going to be written, or that any one but Morse ever saw them. They were not produced or offered by plaintiffs, until Egan's examination had been closed, and Egan was dead. There can be no pretense that they are proof or evidence of any of the statements therein contained. All that, under any circumstances they could prove was that Egan, at that time, said he had been doing certain things and believed certain things. He reported as to what he did and believed, and the report was received in evidence; he had been examined as to what he did and believed, and that examination had been introduced in evidence.

We submit that the admission of these letters cannot be justified under any principle of law, and was error.

The next two letters, Exhibits 18 and 19, objected to on the same ground, were letters from Egan to Platt and from Egan to Roberts, Platt's secretary (fol. 396). Morse does not testify that he ever saw these letters or relied upon them, and we cannot imagine upon what theory they were admitted in evidence. They were certainly incompetent and irrelevant.

These letters having been written by Egan to these parties during his examination, with the very evident intention of arousing such an interest in the property that they would assist him in the purpose he had formed to make a personal profit in the matter, contain many grossly exaggerated statements. Under the ruling of

the Court, admitting them in evidence, the jury may well have understood that defendant was chargeable with these statements as representations, and that they were evidence of deceit practiced by him upon Egan. For this error a new trial should be granted.

Every error clearly shown to exist is *prima facie* injurious to the appellant, and raises the presumption of prejudice. "To disregard such evidence the Court must be able to say that injury has not resulted, not that it cannot see that injury has resulted."

Mexia vs. Oliver, 148 U. S., 664.
Livingston vs. Met. E. L. R. Co., 138 N. Y., 76.
Atwood vs. Welton, 67 Conn., 514.
Start vs. Wellman, 96 Cal., 400.
Brown vs. Klock, 117 N. Y., 340.

UNLESS, THEREFORE, THE COURT CAN SAY THAT THE IMPROPER EVIDENCE ADMITTED FOR THE PURPOSE OF CHARGING THE DEFENDANT WITH FRAUD IN EACH AND EVERY ONE OF THE ABOVE-MENTIONED CASES WAS NOT INJURIOUS TO THE PLAINTIFF IN ERROR, THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

The Court erred in admitting evidence offered by plaintiffs for the purpose of charging the defendant with damages to others than the plaintiffs personally, and for the purpose of charging defendant with damages to all the subscribers to the subscription paper, Exhibit 1, and to the stock of the Good Hope Mining Company, afterwards incorporated under this subscription.

Assignments and specifications of errors Nos. 12, 13 and 27.

The objections and exceptions appear at folios 366, 493-7, 500, 502, 1356, 1384-5.

The allegations to the complaint under which plaintiffs claim to recover for the subscribers to this subscription paper and the company's stock is as follows: "That plaintiffs throughout the trans-" actions hereinbefore mentioned were acting jointly for their own " benefit and for the benefit of others associated with them in the

"enterprise, and the contract of purchase hereinbefore mentioned "was made with the plaintiffs, in their name, for their own "benefit and that of their associates jointly interested with them; "and they now sue as the trustees of an express trust, in accordance "with the laws and practices of the State of New York" (fol. 26).

Out of over thirty of these subscribers five only testified in the case, or made any claim to having been deceived by the defendant in any particular. These five were Porter, Hobson and Morse, the plaintiffs, and Wood and Egan. Their aggregate investment, after deducting the $45,000 in cash paid Porter, Hobson and Wood, on the sale and conveyance of the property to the subscribers forming the Good Hope Mining Company was: Porter, $15,000; Hobson, $15,000; Morse, $15,000; Wood, $15,000, and Egan, $15,000—money borrowed from Hobson—or a total of $90,000.

The facts proved as to the capacity in which plaintiffs acted are as follows: The matter was brought to the attention of Hobson at Haverhill by Morse, and to Porter's attention by Hobson. Morse then sent for Egan to come to Haverhill. Egan went to Haverhill, and was introduced by Morse to Porter and Hobson (fol. 363). In a few days Morse and Egan wired Griffith to go to Boston. He went, and there met Morse and Egan, who told him they were making a sale in Haverhill. Griffith stayed in Boston about a week, and there met Hobson and Jones, the lawyer, and the contract of sale by Griffith to Porter, Hobson and Morse, and of purchase by Porter, Hobson and Morse from Griffiths was drawn up, signed in Haverhill and in Boston, and delivered (fol. 567).

This agreement (Plff.'s Ex. 1) was dated December 18, 1893, and presumably delivered on that day (fols. 1474, 1485). That is a contract for the purchase by Porter, Hobson and Morse in their individual capacity, and provided for the payment by them, in their individual capacity, to Griffith, of the cash payment therefor, and for the delivery of the mortgages by a corporation to be organized by them. But there is no mention of any associates either in the purchase or in the corporation.

At this time, when Porter, Hobson and Morse had contracted to purchase and pay for the property, there is no evidence that any one had been spoken to in regard to it other than themselves. Wood, whose name appears on the subscription paper (afterwards circulated) directly under the signature of Porter, Hobson and Morse, testifies (fol. 499): "I could not give the exact date on "which I put my signature there. It was some time between the

" 18th, the date of this, and date Mr. Morse went to California" (*i. e.*, the 23d).

At the time of the contract of purchase, therefore, and at the time of the assumption of the liability on the part of Porter, Hobson and Morse to take the title and pay for it themselves, they were not trustees of any trust for anybody, and to that extent were not acting throughout the transactions "jointly for their own benefit and " for the benefit of others associated with them in the enterprise." Nor was the contract of purchase made with the plaintiffs " in their " name, for their own benefit and that of their said associates, " jointly interested with them," there being no associates at that time.

Thereupon a subscription paper was started by Porter which was introduced in evidense, over defendant's objection and exception, as Exhibit No. 2 (fols. 1489–1501). This subscription paper appears on its face to have been started for the purpose of enabling the plaintiffs to relieve the sellers of a portion of the liability they had already incurred. It provides, in substance, that the subscribers thereto agree to pay to Porter on January 1, 1894, their several subscriptions to the amount of $175,000, $150,000 to be applied upon the purchase price of the Good Hope mining property, and $25,000 for the erection of a twenty-stamp mill. The subscriptions, however, are expressly provided in this paper to be made upon condition that $175,000 for payment January 1, 1894, be fully subscribed.

At the time this paper was offered in evidence there was no testimony as to how the subscriptions were obtained, nor when they were obtained, nor whether the subscription paper had ever been filled, it appearing upon its face to have had $168,000 of subscriptions out of the $175,000, which by its terms were required to be subscribed before the paper became operative.

Defendant's counsel objected to the offer, if it was introduced as evidence of liability to anybody except the individual plaintiffs in the case, and as immaterial. The objection was overruled, and exception taken and allowed. Thereupon plaintiffs' counsel read as signers to the subscription paper: "John M. S. Egan, $10,000; " Charles W. Morse, $15,000; John L. Hobson, $15,000; Dudley " Porter, $15,000;" but omitted the other executions and amounts (fols. 366–67).

No further testimony was offered as to the dates or the making of the subscriptions by any of the alleged subscribers to this paper, or the considerations or representations upon which their subscrip-

tions were made, prior to the next offer of the paper in evidence, except that Wood says: "At or about that time" (*i. e.*, the time he made his investment) "I obtained some subscriptions from different "associates. The Burnham and Egan reports I used in obtaining "these subscriptions" (fol. 493). Plaintiffs' counsel thereupon offered to read the other subscriptions, and this was objected to as incompetent and immaterial, and on the ground that the plaintiff cannot in this action recover in a representative capacity for an alleged deceit practiced upon these other subscribers, at least until there is proof that the other subscribers were deceived, so that they could individually maintain an action for deceit.

Plaintiffs' counsel thereupon said: "We will offer these other "signatures. As the point is taken that there can be no recovery "for the othef subscribers, now we offer to prove the fact of their "subscriptions, and the amounts of their subscriptions, and *then we "will put in other evidence.* Does your Honor admit it?

"The COURT: Yes" (fol. 495).

To which ruling counsel for the defendant then and there duly excepted.

Defendant's counsel then further objected that it has appeared by the evidence already, that unknown portions of these subscriptions were not made until long after this transaction was closed. The plaintiffs' counsel thereupon stated the position as to that, as follows: "The evidence is that although these subscriptions had "not all of them at that time been actually made, these gentlemen "went ahead completing the contract to purchase, intending to "associate with themselves other parties, and in a very few days "they did associate other parties, and at the time that they made "the purchase, although these other parties had not actually "joined, they were making the purchase for the benefit of those "others who should be associated with them. That is the posi-"tion." "The COURT: I shall permit the subscription to be read, "and I will give you an exception." Whereupon the full list of "names was read (fols. 494-97):

No further proof was given as to what the other subscribers relied upon in making their investment, nor as to who obtained the other subscribers, except that Wood, who had before testified that he had obtained some of the subscriptions, testifies that he himself procured the following: "H. Carlton, two subscriptions, total, "$8,000; Henry L. Dole, two subscriptions, $5,000; and showed "the reports of these two" (fol. 500). That he also obtained

George C. Howe, $1,000, and James F. West $1,000, and believes these are all, and says: "I could not state any definite statement I "made to them from my recollection at the present time" (fol. 500).

This subscription paper was not filled until after January 1, 1894 (fol. 514).

The $150,000 necessary to be provided by Porter, Hobson and Morse under their individual contract for the purchase of the property from Griffith was provided as follows: Porter, Hobson and Wood, who had apparently then signed this subscription paper for $15,000 each, contributed, in addition thereto, to a pool, $15,000 each, or $90,000 in all (fols. 415, 499 and 535). Egan and Morse borrowed the money at Porter's bank and contributed $25,000, the amount of their subscriptions (fol. 391). The purchasers appear to have been still short of money for their speculation—which they hoped to saddle upon their associates in time—for Porter, who drew two checks aggregating $150,000—one upon his own bank, the Merrimac National, for $90,000, and one on the First National for $60,000, certified on December 22, 1893—admits: "The amount "drawn on my bank, the Merrimac, is $90,000. I did not have "$90,000 on deposit that day. The checks were certified. "I filled my deposit to pay that check before the check "came back, but not until just before, probably; I cannot say ex- "actly" (fols. 534–5).

"These checks were delivered in consummation of the purchase "at Riverside, on December 30, and reached Haverhill on January "6 (fol. 1513). The money was coming in in the meantime" (fol. 535).

Porter further says that he asked the cashier to certify that check, and it was done upon request of himself, and Hobson and Nichols, two of the directors (fol. 535).

Porter attempts to explain this transaction when recalled for that purpose (fol. 709), as follows: "I have testified that some of "the actual cash payments were made after the purchase was com- "pleted in California. For these notes were discounted at the "bank and the money was credited to the 'Certified check ac- "'count.'" But he is only able to name the notes of Wood, Hobson and Morse, and his own, which made up a portion of the $90,000 above mentioned, and Kennedy's. Kennedy's subscription was for $5,000, and is the eighth subscription on the paper, following those above mentioned, and a subscription of Boyd B. Jones of

$10,000 and Charles E. Wiggins of $5,000. Kennedy's subscription is, therefore, the last subscription which is established by the plaintiffs' testimony to have been made prior to the completion of the transaction by the delivery of the deed to Porter, Hobson and Morse from Griffith, and the payment therefor by them, in California on December 30th.

Plaintiffs showed an extraordinary shortness of memory as to the date of the filing of this subscription paper, which date was most material to them to establish their claim that they took the property as trustees of an express trust for the benefit of the subscribers thereto. Wood swears that he obtained the subscriptions of Carlton and Dole, who are among the first subscribers, and says : " I should " say it was before January 1st, I cannot swear to it." And in regard to the subscription of Mr. West, the ninth from the end, says : " I could not give the date of this subscription ; that may have " been, and I think it is, later. There were no names below Mr. " West's when I got his subscription " (fol. 514). The most that plaintiffs can swear to is that the subscriptions were all paid in prior to February 23, 1894.

On December 30, 1893, the contract of sale by Griffith to Porter, Hobson and Morse, and the purchase by Porter, Hobson and Morse from Griffith, was carried out by the delivery of a deed of the property from Griffith to Morse and Egan, representing Porter, Hobson and Morse under a power of attorney executed by them in their individual capacity, appointing Morse and Egan their agents, and by the payment for this property by their agents, with the $150,000 in cash and the mortgage (fols. 274, 368-72). This $150,000 of cash being really the money of Porter, Hobson and Morse, Wood, Egan and Kennedy, and of the Merrimac National Bank, misappropriated by its president, Porter, and one of its directors, Hobson, by overcertification ; so that, at the time of the consummation of this transaction, plaintiffs were not " throughout the transactions herein- " before mentioned acting jointly for their own benefit and for the " benefit of others associated with them in the enterprise." Nor was the contract made with plaintiffs " in their name for their benefit " and that of their said associates jointly interested with them," if by the term " said associates " are intended any others than Egan, Wood and Kennedy, and, possibly, the Merrimac National Bank, whose money had been misappropriated by its officers for the purpose of aiding them in this speculation.

Plaintiffs' counsel substantially admitted at folio 496 that these subscriptions were not all of them made at the time, but that the plaintiffs went ahead and completed the contract, intending to associate with themselves other parties; that in a few days thereafter they did associate other parties. And the plaintiffs' claim is that although these other parties had not actually joined, at the time the transaction was completed and the property purchased by the plaintiffs, the plaintiffs were making the purchase, for the benefit of those who should afterwards join.

This position is not tenable.

After a husband had made an agreement to trade his own property for certain lands, he arranged with his wife that she should take the lands in exchange for certain moneys which he owed her and other moneys belonging to her, and at his request the lands were conveyed directly to her in consummation of the first-mentioned agreement. Held, that the conveyance did not carry with it as pertinent to the lands a cause of action for the deceit of the grantor by which the agreement to trade was induced. The fact that at the time of making the agreement to trade the husband had an intention (not yet disclosed to his wife) to have the lands conveyed to her and take her money instead, and the fact that there had been previous negotiations with the grantor looking to an investment of her money in other similar lands did not render the husband in the making of the agreement to trade an agent for the wife.

Tyson vs. Ranney, 89 Wis., 518.

In the complaint plaintiffs base this claim for right to recover for all the persons who finally purchased from them interests in this property, without introducing proof that such persons were deceived by any one, upon Section 449 of the Code of Civil Procedure. This section is as follows:

"Every action must be prosecuted in the name of the real party "in interest, except that an executor or * * * a trustee of an "express trust, or a person expressly authorized by statute, may "sue without joining with him the person for whose benefit the "action is prosecuted. A person with whom or in whose name "a contract is made for the benefit of another is a trustee of an "express trust within the meaning of this section."

Plaintiffs having proved that their entire investment in this enterprise at the time of the commencement of the suit, after

deducting the portion of it which they had sold, was only $45,000, out of a total of $175,000, or practically one-quarter, might have either sued for fraud practiced upon them, in which suit they would have been charged with the value of the property or the cash which they realized for it, or they might have sued as trustees of an express trust, when they would have been required to show that, at the time of the purchase, there were *cestui que trusts* and who they were; or it may be assumed, for the purpose of this argument, that all the investors might have sued together, or possibly by a committee, but in that case each of them, in order to recover his share, would have been required to prove deceit in his particular case.

Plaintiffs did not adopt the first theory and were not charged with the moneys they realized upon the sale of three-quarters of this property.

Plaintiffs did not adopt the third theory, and no proof of deceit of purchasers of the larger interest in this property was offered. They did adopt the second theory, that they were trustees of an express trust.

The mere words "trustees of an express trust" necessarily imply beneficiaries or *cestuis que trustent existing*.

There is an absolute failure of proof on the part of the plaintiffs that any *cestuis que trustent existed*, as such, at the time of the contract, in respect to which they allege they were deceived.

There was grave error, therefore, in allowing the introduction of the subscription paper as evidence and the refusal of the Court to charge, that the damages must be limited to those suffered by the plaintiffs in this action, and cannot include the damages to other subscribers not proved to have invested on the faith of Egan's endorsement of the Burnham report (fols. 1384–5).

The following summary, based on uncontradicted facts, will show that the exaggerations and misrepresentations, fraudulently made, with a view of inducing the purchase of the mine, were made by Egan, and he was solely responsible for them.

Price: The purchase price of the mine to Sigafus was (fols. 1581, 1584) $230,000.

The fraudulent profit of Morse and Egan, represented by the note to Fillius, secured by the second mortgage, was (fols. 342–5, 393, 565–6, 385, 1537) $108,000.

	What Egan found.	What he reported.
Depth of 1st level	236 ft.	
"		250 ft.
Distance between levels	94	
"		100
Average of bullion returns for July to October, 1893	$15.76	$16.81
Average of assays	$17.44	
		$23.00
Crude ore assay	$31.00	
		$38.00
Number of tons in test-mill run	47	
		25
Produce of test-mill run	$674.87	
		$724.00
Average per ton of test-mill run	$15 to $17	
		$36.97
Ore in reserve and in (fol. 1218) sight.		46,922
Experts on both sides say there is no (fol. 1406, fol. 1410) difference	40,068 tons	19,833
		66,755 tons

	Citation.	What Egan Did.	What All Experts Agree He Should Have Done.
Boards at the south end of the 2d level.	fols. 757–8, 765–7; 783–6;	It appears that, although the rails of the track ran under these boards and there was an opening through them of three or four feet in height from the rails, Egan claims to have made no examination whatever beyond the boards.	He should have gone through the hole, over the track, or had the boards taken down.
Heap of débris at the north end of the 2d level.	fol. 230.	It appears that, although Egan noticed it and was told by Cheatham that the level went some little further, he took no steps to have it removed and made no inquiry with respect to it.	He should have had the pile removed and made an examination.

Stulling and lagging.	It is claimed that Egan made no examination where the walls were supported by stulling and lagging.	He should have made such examination, and in the absence of it was not warranted in making any assumption with respect to the ground behind.

From this uniform exaggeration of what he found, and from his willful omission to look at anything unfavorable, no conclusion is possible, except that his report was willfully false and prepared by him for the purpose of deceiving his customers.

Source and character of the charges of fraud against Sigafus in the testimony.

CHARGE.	EGAN'S RELATION TO IT.
Published the Burnham report.	Egan says he verified it. If he did, he could not but have noticed its many inaccuracies and inconsistencies. It is Egan who vouches as to the correctness of the Burnham report to the plaintiffs, and no one else; and it is through Egan only that any connection is made with the defendant.
Concealed the two ends.	Egan was bound to look behind the boards and the heap of debris, which were in themselves notice to him that there was something behind them. There was no deceit of the plaintiffs with respect to this, except through Egan; and the sole proof that Egan was deceived with respect to it is his negative testimony that the defendant omitted to tell him.
Falsified the mill run.	It was Egan's mill run. With respect to its amount, Egan states the number of skips, admits he knew how much the skip held—from which it was a mere question of multiplication for him as a mining expert to know exactly the number of tons, and that instead of being 25, there were 47. This error alone would reduce the figures from $36 to $17 per ton.

Carried the stopes to an irregular height, so as to expose only the widest portion of the vein.

Egan examined it. He says he measured it on all sides; on the floors of the levels, which were necessarily horizontal; on the sides of the raises and shafts, which were necessarily straight; and in the backs of the stopes, which were undoubtedly irregular.

The only way in which the plaintiffs were deceived with respect to this was through Egan; and the only proof that Egan was deceived is his own statement.

It appears, then, that Egan made a false report, and willfully exaggerated the value of the Good Hope Mine; that the plaintiffs purchased upon the faith of this report alone; and that it is only through Egan that there is any proof or suggestion of proof of deceit of plaintiffs by the defendant.

For all the foregoing reasons the judgment and verdict in this action should be set aside and a new trial ordered.

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